(15)

No. 98-1993-CSY Title: Florida, Petitioner
v.
J. L.

Docketed: Court: Supreme Court of Florida
June 11, 1999

Entry	Date	Proceedings and Orders
	Jun 7 1999	Petition for writ of certiorari filed. (Response due July 11, 1999)
	Jul 21 1999	DISTRIBUTED. September 27, 1999
	Jul 22 1999	Waiver of right of respondent J. L. to respond filed.
	Aug 20 1999	Response requested.
	Sep 20 1999	Brief of respondent J. L. in opposition filed.
	Sep 23 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Oct 6 1999	REDISTRIBUTED. October 29, 1999
	Nov 1 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 1 1999	Petition GRANTED. SET FOR ARGUMENT February 29, 2000. **********
	Dec 1 1999	Motion of petitioner to dispense with printing the joint appendix filed.
	Dec 8 1999	Brief amici curiae of American for Effective Law Enforcement, Inc., et al. filed.
	Dec 9 1999	Motion of petitioner to dispense with printing the joint appendix DISTRIBUTED.
	Dec 10 1999	Order extending time to file brief of petitioner on the merits until December 23, 1999.
	Dec 13 1999	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Dec 16 1999	Brief amicus curiae of National Association of Police Organizations filed.
	Dec 23 1999	Brief of petitioner Florida filed.
	Dec 23 1999	Brief amici curiae of Illinois, et al. filed.
	Dec 23 1999	Brief amicus curiae of Justice Coalition filed.
	Dec 23 1999	Brief amicus curiae of United States filed.
	Jan 7 2000	CIRCULATED.
	Jan 12 2000	Record filed.
	Jan 14 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 20 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Jan 21 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 24 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 25 2000	Brief amici curiae of National Rifle Association, et al. filed.
	Jan 25 2000	Brief amicus curiae of Congress of Racial Equality, Inc.

No. 98-1993-CSY

Entry	Date	Proceedings and Orders
		filed.
	Jan 25 2000	Brief amicus curiae of Rutherford Institute filed.
	Jan 25 2000	Brief of respondent J. L. filed.
	Feb 18 2000	Reply brief of petitioner Florida filed.
	Feb 29 2000	ARGUED.

Supreme Court, U.S.
FILED

98 1993 JUN 7 1999

OFFICE OF THE CLERK

CASE NO.

IN THE UNITED STATES SUPREME COURT

October Term 1998

THE STATE OF FLORIDA,

Petitioner,

vs.

J.L., a juvenile,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location, with a detailed description of the person and his attire, is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip?

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CASE NO.
IN THE UNITED STATES SUPREME COURT
October Term 1998

THE STATE OF FLORIDA,
Petitioner,

vs.

J.L., a juvenile,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *J.L. v. State*, 727 So. 2d 204 (Fla. 1998).[A-1].[1] The decision of the District Court of Appeal of Florida, Third District is reported at 689 So. 2d 1116. [A-31]. The trial court's order granting the motion of Respondent, J.L., to suppress the evidence is not reported.[A-35].

JURISDICTION

The Supreme Court of Florida's opinion was filed on December 17, 1998 and rehearing was denied on March 9, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, § 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution,

STATEMENT OF THE CASE AND FACTS

Respondent, J.L., was the Petitioner in the Supreme Court of Florida. The facts of the case were established in the evidentiary hearing held by the trial court on Respondent's motion to suppress. The evidence that was the subject of the suppression motion was a firearm. Based on Respondent's possession of the gun, a petition for delinquency was filed, charging Respondent with unlawfully carrying a concealed firearm and unlawful possession of a firearm by one under 18 years of age. [A-19].

The sole witness at the evidentiary hearing on the motion to suppress was Officer Carmen Anderson. She testified that on October 13, 1995 while on patrol, she was dispatched to the area of 183rd Street and 24th Avenue in Miami based on information received from an anonymous tipster. The details of the tip were that there were several young black males standing at a bus stand in front of a pawn shop, one of whom was carrying a concealed firearm. The individual carrying the firearm was described as a black male with a plaid shirt. The informant also gave a description of the other men at the bus stop. [A-40-41].

Officer Anderson and another unit arrived at the bus stop approximately six minutes after receiving the dispatch. As Officer Anderson and the other officer approached the bus stop, Officer Anderson saw three black males, one of whom was wearing a plaid shirt. The three black males were found at the precise location where the anonymous informant said they would be found. [A-41-42].

Officer Anderson immediately went to the black male fitting the description of the one who was carrying a concealed firearm. She asked the black male with the plaid shirt to place his hands on the bus stop. As Officer Anderson began to frisk him, she saw the butt of a gun coming out of his left pants pocket. She removed the gun and arrested the Respondent. [A-42].

The trial court found the evidence was insufficient to support a reasonable suspicion of criminal activity and suppressed the gun. [A-35-36]. The Petitioner, the State of Florida, appealed the suppression order to the District Court of Appeal of Florida, Third District.

The Third District reversed the trial court's granting of the motion to suppress. The Third District concluded that there was reasonable suspicion that Respondent was committing the crime of carrying a concealed firearm and thus the officer was justified in stopping and frisking him. The Third District based this holding on the ground that the police officers found themselves, based on the extent of verification, in a situation in which they had a reasonable suspicion that Respondent was carrying a concealed weapon and they had to take some action, but in doing so, they also had to secure their own safety. This the officer did by the warrantless frisk. The Third District agreed with the analysis by the court in *United States v. Bold,* 19 F.3d 99 (2nd Cir. 1994) , where the court held that where a confirmed tip concerns an individual with a gun, the officer is faced with the choice of stopping and searching the individual, or waiting until the individual brandishes or uses the gun and the latter choice is unacceptable, thus leaving the stop and frisk as the only reasonable choice. [A-31-34].

The Respondent then sought to invoke the discretionary jurisdiction of the Supreme Court of Florida. The court accepted jurisdiction and quashed the decision of the Third District. [A-12]. The court based its ruling on the fact that reasonable suspicion is not established by an anonymous tip which provides only innocent details, and upon investigation only the innocent details are verified. The court held that anonymous tips can provide the basis for reasonable suspicion only when it can be established that the tip is reliable. Reliability of an anonymous tip can be established when the tip describes suspicious details concerning conduct that is presently occurring or is about to occur in the future and such conduct is verified by the police. Reliability of an
innocent details tip can be established if the tip predicts particular future action which is verified by the police. If an innocent details tip does not concern future action, then reasonable suspicion can be established by verification of a presently occurring innocent details tip coupled with an independent police investigation which would have to

uncover something more that just a verification of the innocent details. [A-4-9].

Based on the foregoing facts, the court held that stop and frisk was unreasonable because the police officer's independent investigation only corroborated the innocent details and did not establish that the suspect was engaging in suspicious behavior. The court then suggested that the police officer involved should have used a less intrusive means, such as a consensual encounter, to determine if the suspect was armed and dangerous before a frisk would have been justified. The court also suggested a more reasonable approach was to wait until some observable suspicious conduct took place in order to justify the frisk. The court based the foregoing holding on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and held that to approve the instant stop and frisk would create a "firearm exception" to *Terry*, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleged that an individual is carrying a firearm. The court rejected the so called "firearm exception" because it was unwilling to carve out a new exception from the original exception recognized in *Terry*. [A-9-11].

The dissent found the majority's interpretation of *Terry* was overly restrictive and erroneous. The dissent found that an anonymous tip concerning an individual with an illegally concealed firearm presents a unique situation. When confronted with this situation, police officers may not be able to verify more than the innocent details of the tip without substantially risking their safety or the safety of the general public. If police officers are not allowed to stop and frisk such individual they must wait until the individual brandishes or uses the gun before they can act. This the dissent found was unreasonable because the additional suspicious circumstances that the majority required before the police may act will too often turn out to be the suspect's actual use of the unseen firearm. [A-24].

The dissent would have joined the majority of jurisdictions that have recognized a "firearm exception" to the general rule that the corroboration of only the innocent details of an anonymous tip does not provide police officers with reasonable suspicion of criminal

activity. Such a holding is necessary because the great risk of harm to the public and police in such a situation substantially outweighs the limited privacy intrusion to the suspect. The dissent believed such a holding is true to the dictates of *Terry* which does not require that the officer be absolutely certain that the individual is armed but rather whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. The dissent then found that it is clearly reasonable in today's society for law enforcement officers confronted with the circumstances in this case to conduct a stop and frisk. Therefore, the dissent would have affirmed the decision of the Third District. [A-19].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT AN ANONYMOUS TIP CONTAINING INNOCENT DETAILS IN ADDITION TO THE FACT THAT THE SUSPECT WAS CARRYING A CONCEALED FIREARM WAS INSUFFICIENT TO PROVIDE REASONABLE SUSPICION TO STOP AND FRISK THE SUSPECT AFTER THE INNOCENT DETAILS WERE IMMEDIATELY VERIFIED CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF THE OTHER STATES.

In this case, the police received an anonymous tip that one of three young black males standing at a bus stop in front of a pawnshop at a specific and public location was carrying a concealed firearm. The tipster described the appearance of each of the young males and said that the individual with the gun was wearing a "plaid-looking" shirt. Officer Carmen Anderson, a police officer with more than fourteen years of experience, and another officer arrived at the scene only six minutes after receiving the anonymous complaint. The officers immediately verified the accuracy of all of the appearances and location information provided by the tipster. Respondent was standing by the bus stop with two other young black males and he was wearing a plaid shirt. Officer Anderson approached Respondent, asked him to put his hands above his head, and conducted a pat-down of his outer garments. Officer Anderson then seized a gun that she saw protruding from Respondent's left pocket. [A-40-42]. Respondent was taken into custody and charged with unlawfully carrying a concealed firearm and possession of a firearm by a minor under eighteen years of age. [A-19].

Based on the foregoing facts the Supreme Court of Florida held that the stop and frisk was unreasonable because the police officer's independent investigation only corroborated the innocent

details and did not establish that the suspect was engaging in suspicious behavior. The court then suggested that the police officer involved should have used a less intrusive means, such as a consensual encounter, to determine if the suspect was armed and dangerous before a frisk would have been justified. This Court also suggested a more reasonable approach was to wait until some observable suspicious conduct took place in order to justify the frisk. [A-8-9]. The court based the foregoing holding on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and held that to approve the instant stop and frisk would create a "firearm exception" to *Terry*, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleged that an individual is carrying a firearm. The court adopted the minority view espoused in *Commonwealth v. Hawkins*, 692 A. 2d 1068 (Pa. 1997) and rejected the so called "firearm exception" because it was unwilling to carve out a new exception from the original exception recognized in *Terry*. [A-9-11].

The majority view, which was rejected by the Supreme Court of Florida, holds that when the police receive an anonymous tip alleging that a person is carrying a concealed weapon and only the innocent details of the tip are verifiable, the police may conduct an investigatory stop and frisk of the suspect. *See, e.g., United States v. Roberson*, 90 F. 3d 75 (3rd Cir. 1996) *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996); *United States v. Gibson*, 64 F. 3d 617 (11th Cir. 1995); *United States v. Bold*, 19 F. 3d 99 (2nd Cir. 1994); *United States v. Clipper*, 973 F. 2d 944 (D.C. Cir. 1992); *United States v. McClinnhan*, 660 F. 2d 500 (D.C. Cir. 1981); *Speight v. United States*, 671 A. 2d 442 (D.C. 1996); *United States v. Johnson*, 540 A. 2d 1090 (D.C. 1988); *United States v. Mason*, 450 A. 2d 464 (D.C. 1982); *State v. Kuahuia*, 616 P. 2d 1374 (Haw. 1980); *People v. Smithers*, 415 N.E. 2d 327 (Ill. 1980); *Graham v. Commonwealth*, 667 S.W. 2d 697 (Ky. Ct. App. 1983); *State v. Jernigan*, 377 So. 2d 1222 (La. 1979); *State v. Hasenbank*, 425 A. 2d 1330 (Me. 1981); *Johnson v. State*, 439 A. 2d 607 (Md. Ct. Spec. App. 1982); *State in re H.B.*, 381 A. 2d 759 (N.J. 1977); *State v. Williams*, 598 A. 2d 1258 (N.J. Super. Ct. Law Div. 1991); *State v. Sharpless*, 715 A. 2d 733 (N.J. Super Ct. App. Div. 1998); *People v. McLaurin*, 374 N.E. 2d 614 (N.Y. 1978); *State v. Pulley*, 863 S.W. 2d 29 (Tenn. 1993);

State v. Franklin, 704 P. 2d 666 (Wash. Ct. App. 1985). This position is in consonance with the underlying rationale of *Terry*, which is to protect law enforcement officers and the general public from the dangers associated with armed suspects.

The majority view takes into account the unique situation that is presented by an anonymous tip concerning an individual with a concealed firearm. When confronted with this situation, police officers may not be able to verify more than the innocent details of the tip without substantially risking their safety or the safety of the general public. When faced with this situation the police officer must either stop and search the individual or wait until the individual brandishes or uses the gun. *United States v. Bold*, 19 F. 3d 99, 104 (2nd Cir. 1994). As the dissent herein recognized:

> To say that the officers in this case should have waited until this child did something more to arouse their suspicion is unreasonable. I fear that the "additional suspicious circumstances" required by the majority before the police may act will too often turn out to be the suspect's actual use of the unseen firearm. In light of the recent homicides committed by children, I suspect that the public's reaction to the majority's decision will be, "Where is your common sense?"

[A-24].

The dissent herein also agreed with the majority view point that this principle should only apply in this setting when only an illegally concealed firearm is the subject on the anonymous tip. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973). In *United States v. Roberson*, 90 F. 3d 75 (3rd Cir. 1996) the Court refused to find that reasonable suspicion existed for an investigative stop when they received an innocent details tip giving a description of the suspect, a location and the fact the suspect is dealing illegal drugs. To hold otherwise, the court held, would be too great an intrusion on the rights of the people. In this situation the balance is weighed in the individual's favor since the safety of the officer or others is not at risk. Here it is entirely reasonable to require the police

officer to set up surveillance and wait for suspicious behavior to occur. Thus when an innocent details tip concerning drug dealing is involved, reasonable suspicion exists only when there is corroboration of information from which the police could reasonably conclude the anonymous tipster's allegation was reliable.

The majority view is within the mainstream of Fourth Amendment jurisprudence. The Fourth Amendment to the United States Constitution requires that a search be reasonable. The reasonableness of a search is a substantive determination made from the facts and circumstances of the case and in light of the fundamental criteria laid down by the Fourth Amendment and in opinions of the United States Supreme Court applying that amendment. *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). The standards of reasonableness required under the Fourth Amendment are not susceptible of Procrustean application. *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967). The Fourth Amendment proscription against unreasonable searches and seizures is not to be read in a vacuum, and thus, a search and seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

This Court in *Terry*, recognized the need for public safety and created the stop and frisk doctrine. The doctrine permits a police officer to stop an individual in circumstances where the officer possesses reasonable suspicion that the individual is engaged in criminal activity. It also permits an officer to conduct a limited frisk of the individual if the officer possesses reasonable suspicion that the individual is armed and poses a threat to the officer or others.

The rationale of *Terry* is to protect law enforcement and the general public from the dangers associated with armed suspects. The Court stated this rationale as follows:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations

> where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id., 392 U.S. at 24. In formulating the reasonable suspicion test, the Court balanced the privacy interests of citizens with the safety of officers and the public. After properly balancing these interests the Court reached the following conclusion:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Id., 392 U.S. at 27.

Terry's stop and frisk doctrine, just like the Fourth Amendment from which it derived from, is not susceptible of Procrustean application. In *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1990), the Court rejected, in an airport drug smuggling scenario, a rigid and arbitrary application of *Terry*. In *Sokolow* the defendant was stopped upon his arrival at Honolulu International Airport. He was stopped based on the following facts: (1) he paid $2,100 for two airplane tickets from a roll of $20 Bills; (2) he traveled under a name that did not match the name under which his telephone was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his

luggage. The Court found, even though these factors in and of themselves was not proof of any illegal conduct and were quite consistent with innocent travel, that defendant's stop was lawful. In holding that innocent conduct can support a stop and frisk, the Court recognized that "*Terry* itself involved 'a series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together warranted further investigation.'" *Id.* at 10-11. The Court then held that the following principle applies equally to the reasonable suspicion inquiry:

> [T]hat "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."

Id., 490 U.S. at 11.

Based on the foregoing opinions of the Court applying the Fourth Amendment, it is clear that stop and frisk in the instant case was lawful. After the innocent details of the tip were immediately verified, reasonable suspicion existed to conduct a further investigation. Thus, the officer armed with the tip that one of the youths was carrying a firearm had authority, for the officer's protection, to frisk him for the firearm.

The majority opinion rejected this interpretation by finding that the totality of the circumstances did not provide the officer with reasonable suspicion to further investigate whether criminal activity was afoot. The majority based this holding on the following grounds: (1) the anonymous tip was unreliable because it did not involve suspicious behavior which the police could have verified as suspicious upon arrival at the scene; (2) the innocent details provided in the tip did not involve future action for which the police could verify whether or not such future action would occur: and, (3) the presently occurring innocent detail tip was not corroborated through an independent investigation on the part of the police which established that the suspect was engaging in suspicious behavior.

The majority's decision adopted the minority viewpoint nationwide which has only been adopted by Pennsylvania in *Commonwealth v. Hawkins*, 692 A. 2d 1068 (Pa. 1997) and Massachusetts in *Commonwealth v. Alvarado*, 667 N.E. 2d 858 (Mass. 1996). The foregoing decisions, which were decided pursuant to the respective state constitutions, are grounded on the fact that it is not illegal to carry a licensed gun. Thus, a police officer who receives an anonymous tip that a person is carrying a concealed firearm without more does not equate to a reasonable suspicion that the person has been, is, or will be engaged in criminal activity and therefore is not warranted in making an investigatory stop.

The majority also suggested that the officer use the less intrusive alternatives of a consensual encounter or waiting until the firearm was brandished to determine if the youths were engaged in criminal activity or were armed and dangerous. This is also an incorrect interpretation of Fourth Amendment jurisprudence. The reasonableness of an officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory technique. Such a rule would unduly hamper the police's ability to make swift, on the spot decisions and it would require courts to indulge in unrealistic second-guessing. *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 351 (1983).

The majority was also concerned with the potential abuse of anonymous tipster for giving police false information in order to harass individuals for personal reasons. As the Eleventh Circuit in *United States v. Gibson*, 64 F. 3d 617 (11th Cir. 1995) noted such concern does not provide reasonable grounds to hold reasonable suspicion does not exist under the instant facts. The court noted that Florida provides a significant deterrent against reporting false information to law enforcement agencies and officers by making such acts punishable by law. Specifically § 365.171 (16), Florida Statutes (1997) makes it a first degree misdemeanor to makes false "911" calls and § 817.49, Florida Statutes (1997) makes it a first degree misdemeanor for making false reports of commission of crimes to law enforcement officers.

The result reached by the Supreme Court of Florida is in direct conflict with the opinions of this Court which apply the Fourth Amendment, specifically *Terry v Ohio*, 392 U.S. 1 (1968) and *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1990). Considering the totality of the circumstances in this case, including the limited ability of the officer to confirm all of the anonymous tip information, the report that one of the individuals possessed a gun and the statistical likelihood that the gun was illegal, the intrusion upon the privacy of the Respondent was minimal and the oficer's had a reasonable suspicion under *Terry* to stop and frisk the respondent. To hold otherwise and require police, in situations as were involved herein, to wait for the brandishment or use of the firearm before finding reasonable suspicion would effectively negate the *Terry* doctrine. Besides the instant decision, only the Pennsylvania and Massachusetts Supreme Courts have applied Terry so restrictively. Present split in authority will only continue to widen without guidance from this Court, and therefore this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, the State of Florida, respectfully requests that this Court grant its Petition for Writ of Certiorari to the Supreme Court of Florida and summarily reverse the Supreme Court of Florida based on the authorities herein cited .

Respectfully submitted,
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CASE NO.
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THE STATE OF FLORIDA,
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion, J.L. v. State, Supreme Court of Florida, December 17,1998 . . . . . A-1

Order Denying Rehearing, March 9, 1999 . . . . . A-29

Opinion, J.L. v. State, District Court of Appeal of Florida, Third District, February 12, 1997 . . . . . A-31

Order Granting Motion to Suppress, Circuit Court of the 11th Judicial Circuit of the State of Florida in and for Miami Dade County Dated April 11,1996 . . . . . A-35

Excerpt from the evidentiary hearing on Respondent's Motion to Suppress A-36

Supreme Court of Florida

No. 90,361

J.L., a juvenile,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

No. 90,361
[December 17, 1998]

PER CURIAM.

We have for review State v. J.L., 689 So. 2d 1116 (Fla. 3d DCA 1997), which expressly and directly conflicts with Butts v. State, 644 So. 2d 605 (Fla. 1st DCA 1994). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. For the reasons expressed below, we decline the State's invitation to create a firearm or weapons exception[1] to

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[1] The procedure employed by the police in this case is not permissible under the current law. It would only be permissible if this Court were to recognize an exception to the current law.

the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution.

The facts and issues in this case and Butts are similar in nature. Both cases involve an anonymous telephone tip and the issue of whether the police possessed the necessary reasonable grounds to stop and frisk a citizen based solely upon the anonymous tip.

In this case, the police received an anonymous tip stating that several young black males were standing at a specified bus stop during the daylight hours. The anonymous informant stated only that one of the individuals, the one wearing the "plaid-looking" shirt, was carrying a gun. Two police officers arrived at the specified bus stop approximately six minutes after receiving the anonymous tip and observed three black males, one of whom was wearing a plaid shirt. The three males were engaged in no suspicious or illegal conduct and no additional suspicious circumstances were observed by the officers. One of the officers immediately accosted J.L., who was wearing a plaid shirt, and ordered him to put his hands above his head. Then, without questioning or other introduction, the officer proceeded to frisk J.L. and seized a gun from J.L.'s left pocket. At the same time, the second officer, again without discussion, frisked the other two individuals. At trial, J.L.'s motion to suppress the gun was granted. On appeal, the Third District Court of Appeal reversed and held that the police had a reasonable suspicion that J.L. was carrying a concealed weapon. See J.L., 689 So. 2d at 1117. The district court reasoned that the investigatory stop and frisk was justified because the surrounding circumstances indicated to the officers that the anonymous tip was reliable. See id.

In Butts, the police received an anonymous tip describing the appearance and location of a man on a bicycle who was said to be carrying a concealed gun and possibly selling drugs. The officers responded to the tip and observed Butts, who matched the description provided by the informant, riding a bicycle in the location described by the informant. The officers stopped Butts after a brief chase and detained him. The officers observed a gun in Butts' pocket and seized it. The officers frisked Butts and seized packets of cocaine and heroin. At trial, Butts' motion to suppress the gun and drugs was denied. On appeal, the First District Court of Appeal held that the anonymous tip was not sufficiently reliable because it lacked specificity and the officers failed to independently corroborate significant aspects of the tip. See Butts v. State, 644 So. 2d at 606. Specifically, the district court found that the tip failed to provide predictions regarding Butts' future movements or activities and that the police officers only verified the innocent and nonincriminating details of the tip. See id. In addition to the First District in Butts, the Fourth District has held that verification of an anonymous tip, by itself, is insufficient to justify a stop and frisk. See Pinkney v. State, 666 So. 2d 590 (Fla. 4th DCA 1996).

In this case, J.L. asserts that the police officers did not have the requisite reasonable suspicion to justify a stop and frisk and that consequently the seizure of the firearm was unconstitutional. J.L. notes that the anonymous tip included no predictive qualities and that the officers only verified the innocent details of the tip.

We begin our analysis by noting that one of the cornerstones of this nation's foundation is the constitutional protection that individuals have a right to be free from unreasonable searches and seizures. See U.S. Const. amend.

IV. The decision of the district court in J.L. seriously infringes upon this defining right.

The law is well established that a police officer may, in appropriate circumstances, stop a person for the purpose of investigating possible criminal behavior, even though there is no probable cause for an arrest, as long as the officer has reasonable suspicion that the person is engaged in criminal activity. See Terry v. Ohio, 392 U.S. 1, 19-23 (1968). The circumstances may even require a frisk of the person to determine whether the person is carrying a weapon, if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. See id. at 27. However, when the police act on the information of an informant, the reliability of that information must be established before a citizen can be stopped and frisked.

Anonymous tips are generally less reliable than tips provided by known informants who have previously provided information to the police in the past, see Adams v. Williams, 407 U.S. 143, 146-47 (1972), or face-to-face informants, see United States v. Salazar, 945 F.2d 47, 50-51 (2d Cir. 1991). Tips from known reliable informants, such as an identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police, will almost invariably be found sufficient to justify police action. In contrast, anonymous tips must be closely scrutinized. "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" Alabama v. White, 496 U.S. 325, 329 (1990) (quoting Illinois v. Gates, 462 U.S. 213, 237 (1983)).

However, an anonymous tip can provide the basis for reasonable suspicion, provided that it can be established that the tip is reliable. See White, 496 U.S. at 332. A tip's reliability can be established in a number of different ways. A tip may describe suspicious details concerning conduct that is presently occurring or is about to occur in the future (i.e., a call received after midnight, on a warm summer evening, stating, "A person is carrying a gun; that person is wearing a ski mask and a long trench coat and is approaching a convenience store."). Verification by the police of the suspicious details clearly provides the police with the requisite reasonable suspicion to make a Terry stop.

The more difficult case involves those tips which allege criminal conduct, but only describe "innocent details of identification," for which the details in and of themselves are in no way incriminating or indicative of criminal behavior. Butts, 644 So. 2d at 606 (quoting Robinson v. State, 556 So. 2d 450, 452 (Fla. 1st DCA 1990)). Innocent detail tips merely provide the police with verifiable details which are completely innocent in nature (i.e., a tip similar to the one in this case, which only describes innocuous clothing, location, etc.). Nevertheless, innocent detail tips can still prove to be reliable and be the foundation for reasonable suspicion. See United States v. Walker, 7 F.3d 26, 31 (2d Cir. 1993). For instance, a tip can predict particular actions which will occur in the future. Future predictions can establish that the tip is reliable if the tip "contain[s] a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." White, 496 U.S. at 332 (quoting Gates 462 U.S. at 245). "[I]ndependent corroboration by the police of significant aspects of the informer's predictions [can] impart[] some degree of reliability to the other allegations made by the caller." Id. If the actions do occur as the informant predicted,

and the actions involve matters to which a normal person would not be privy, this demonstrates that the informant has a "special familiarity with the [suspect's] affairs," beyond the knowledge that a normal person would possess. Id.

Reasonable suspicion can be established by verification of a presently-occurring innocent detail tip coupled with an independent police investigation. See generally United States v. Bold, 19 F.3d 99, 103 (2d Cir. 1994). But for these types of tips (presently-occurring innocent detail tips), the independent police investigation would have to uncover something more than just a verification of the innocent details. The police must observe additional suspicious circumstances as a result of the independent investigation. See White, 496 U.S. at 329 ("Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of the suspect would be authorized."). Judge Allen's opinion in Butts provides the correct framework for analysis:

> An anonymous tip can provide the basis for an investigatory stop when the tip, as corroborated by independent police work, exhibits sufficient indicia of reliability to furnish police with a reasonable suspicion that the defendant is engaged in criminal activity. Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The "totality of the circumstances" test is used to determine the requisite level of suspicion. Id. The reliability of an anonymous tipster's information is evaluated in part on its degree of specificity and in part on the independent corroboration of significant aspects of the informant's

> predictions. Swanson v. State, 591 So.2d 1114, 1116 (Fla. 1st DCA 1992).

644 So 2d at 606.

The State argues that the tip in the present case is reliable. We disagree. Initially, we must observe that the essential issue presented here would be the same whether the anonymous tip involved three white males in business suits waiting for a taxi, or three white females waiting for a ride to a certain location. The officers received an anonymous tip that a young man was carrying a concealed weapon. The tip disclosed that the young man was standing by a bus stop at a specific location and that he was wearing a plaid-looking shirt. The reliability of this tip was not proven by any of the previously described ways recognized as sufficient in our case law. The tip did not involve suspicious behavior which the police could have verified as suspicious upon arrival; rather the tip involved innocent details, none of which involved incriminating or criminal behavior.

Further, the innocent details provided in the tip did not involve future action for which the police could verify whether or not such future action would occur; rather the tip involved present action which could have been provided by "any pilgrim on the roadway." Butts, 644 So. 2d at 606 (quoting Robinson, 556 So. 2d at 452). Finally, the presently-occurring innocent detail tip was not corroborated through an independent investigation on the part of the police which established that the suspect was engaging in suspicious behavior; rather, "the officers' independent investigation added nothing to the reliability of the tip"--the officers merely verified that the defendant was in fact standing by the bus stop and wearing a plaid shirt, neither of which is suspicious. Butts, 644 So. 2d at 606. Based on this record, we are unable to conclude that this

tip exhibited "sufficient 'indicia of reliability'" to furnish the police with the necessary reasonable suspicion to make a Terry stop and frisk. White, 496 U.S. at 328 (quoting Adams v. Williams, 407 U.S. 143, 147 (1972)).[2]

The officers in the present case merely arrived at the scene and confirmed that a male was wearing a plaid-looking shirt and standing by a bus stop. There is nothing suspicious about either of these details. Further, the officers did not observe anything suspicious about the suspect prior to performing the Terry stop. The officers' actions are also called into serious question by the fact that the officers frisked all three individuals standing near the bus stop, not just the individual wearing the plaid shirt. Under the totality of the circumstances, we are unable to conclude that the officers had

[2] The district court in J.L. cited to Bold to support its holding. However, Bold is distinguished from the present case. In Bold, the police received a tip that a twenty-one year old black male was carrying a gun. The informant alleged that the suspect was in a four-door gray Cadillac parked outside of a particular White Castle restaurant. The police verified the details of the tip and conducted an independent investigation, which revealed additional suspicious details that were separate and distinct from the details provided by the tip. When the police arrived, they noticed that the car was located in a remote part of the parking lot. One of the officers testified that the location of the car "raised [his] suspicion that [the people in the car] might be having something to hide." Bold, 19 F.3d at 103. Further, the officers were unable to look into the car to further verify the tip because the windows of the car were darkly tinted. Another officer testified that the window tinting "aroused [his] caution level." Id. at 100-01. The Second Circuit Court of Appeals concluded that "the anonymous tip in this case did not itself provide information from which to conclude that the caller was honest or his information reliable." Id. at 103. Thus, the police did not obtain the necessary reasonable suspicion to justify the Terry stop until the officers personally perceived the suspicious circumstances as a result of their own independent investigation. The actions of the police officers in the present case cannot be considered the equivalent of the independent investigation that took place in Bold.

reasonable suspicion to stop and detain the three people at the bus stop and conduct a frisk in this case. Of course, there was nothing to prevent the police from engaging in a consensual encounter with the trio or from questioning them concerning their possession of a weapon as reported in the anonymous tip. However, the officers' forcible actions in response to the anonymous tip were an active intervention into an otherwise peaceful situation and did not warrant a frisk until some observable suspicious conduct took place. Therefore, we agree with the trial court that the evidence recovered as a result of the impermissible stop and frisk should have been suppressed.

We are aware that other jurisdictions appear to recognize a "firearm exception"[3] to the reasonable suspicion test. See United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996) (holding that evidence is admissible based on mere verification of a presently-occurring innocent detail tip); United

[3] Often, carving out exceptions to constitutional principles can lead one to the top of a "slippery slope." In Terry, the United States Supreme Court recognized a limited exception to the probable cause requirement. The Supreme Court reasoned:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has a reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Terry v. Ohio, 392 U.S. 1, 27 (1968) (emphasis added).

Those jurisdiction recognizing a "firearm exception" are in essence carving out an exception to an exception, by requiring less than reasonable suspicion for a Terry stop in response to an anonymous tip which alleges that an individual is carrying a firearm. We are unwilling to carve out this new exception from the original exception recognized in Terry.

States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992) (same).[4] We join the Supreme Court of Pennsylvania in rejecting this exception:

> The Commonwealth takes the radical position that police have a duty to stop and frisk when they receive information from any source that a suspect has a gun. Since it is not illegal to carry a licensed gun in Pennsylvania, it is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. Even if the Constitution of Pennsylvania would permit such invasive police activity as the Commonwealth proposes--which it does not--such activity seems more likely to endanger than to protect the public. Unnecessary police intervention, by definition, produces the possibility of conflict where none need exist.

Commonwealth v. Hawkins, 692 A.2d 1068, 1071 (Pa. 1997). In Florida, it is generally not illegal to possess a firearm. See

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[4] Allowing a "firearm exception" opens the door for potential abuse. For instance, what if a firearm tip proved to be unreliable, and instead of finding a weapon, the police officers discover illegal drugs? We have concerns that this scenario might subject a person to prosecution for possession of illegal drugs. See United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992) (holding that drug evidence obtained as a result of the "firearm exception" stop and frisk was admissible, despite the fact that the tip was incorrect in the assertion that the suspect was carrying a gun). It will be difficult to determine where the line should be drawn if such an exception is permitted.

generally ch. 790, Fla. Stat. (1997). Additionally, Florida provides that individuals are permitted to carry concealed weapons with a proper license. See § 790.06, Fla. Stat. (1997). There are even certain situations (not involved here) where juveniles are permitted to possess firearms. See § 790.22, Fla. Stat. (1997).

For the reasons stated herein, we determine that there is no firearm or weapons exception to the Fourth Amendment and the bare-boned anonymous tip involved herein, by itself, did not provide the police with sufficient cause to stop and frisk.

We recognize that in State v. Webb, 398 So. 2d 820 (Fla. 1981), this Court held that the anonymous information contained in a police BOLO (be on the lookout) bore sufficient indicia of reliability, therefore justifying a stop and frisk. We find that Webb is distinguished from the present case. In Webb, the BOLO was pursuant to an investigation regarding alleged crimes that had already occurred on the previous two days. The suspect matching the BOLO was apprehended in the vicinity of the crime scene, providing further support that the person apprehended was in fact the perpetrator of the crimes. These two factors considered together provided the police with the necessary suspicion to make the stop. These circumstances are in contrast to the facts of the present case, where the police were not investigating a crime that had previously taken place.

In the present case, the Third District relied on this Court's previous decision in Hetland v. State, 387 So. 2d 963 (Fla. 1980). In Hetland, this Court held that an anonymous tip can provide the basis for a valid stop if the tip carries sufficient indicia of reliability. We reaffirm this holding in today's decision. However, we find that a mere detailed description of

a person's clothing and location, by itself, is not enough to sufficiently establish a tip's indicia of reliability.

Accordingly, we quash the decision under review. We approve the opinion of the First District Court of Appeal in Butts.

It is so ordered.

SHAW, KOGAN and ANSTEAD, JJ., concur.

HARDING, C.J., concurs with an opinion, in which KOGAN and ANSTEAD, JJ., concur.

OVERTON, J., dissents with an opinion, in which WELLS, J., concurs.

WELLS, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

HARDING, C.J., concurring.

I concur with the majority. I write to emphasize that the solution to this country's firearm epidemic cannot come at the expense of the principles set forth in the federal Constitution. I am aware that our streets and school grounds[5] have become

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[5] The result of the present case might have been different had the frisk been conducted by a school official on school grounds. See Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights . . . are different in public schools than elsewhere . . . ."); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

venues of public violence, resulting in large part to the availability and accessibility of firearms. The United States Supreme Court recognized the need for public safety in Terry v. Ohio, 392 U.S. 1 (1968), the case which created the stop and frisk doctrine.[6] While Terry did not deal with an anonymous tip relating to a firearm, it did address the balancing of safety and the constitutional protection provided by the Fourth Amendment. A review of Terry leads me to conclude that the Supreme Court would require more than a mere anonymous tip before a police intrusion would be authorized by the Fourth Amendment.

This point is exemplified by a careful analysis of the Supreme Court's language in Terry. The setting in Terry involved "on-the-spot observations of the officer on the beat." Id. at 20. The Supreme Court clearly set out the test for determining when such limited intrusions may take place:

> [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusion upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "'good faith on the part of the arresting officer is not enough.'

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[6] In Terry, the Supreme Court held that a police officer is permitted to stop an individual in circumstances where the officer possesses reasonable suspicion that the individual is engaged in criminal activity. 392 U.S. at 19-23. An officer is also permitted to conduct a limited frisk of the individual if the officer possesses reasonable suspicion that the individual is armed and poses a threat to the officer or others. Id.

> . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police."
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> . . . .
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> . . . The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 21-22, 27 (emphasis added) (citations omitted). Applying this language to the facts of the present case, it becomes obvious that the information provided in the anonymous tip in question was the equivalent of an "inchoate and unparticularized suspicion or hunch," which in and of itself is insufficient to justify police intrusion. Thus, if the language of Terry, and indeed the Fourth Amendment, is to have any meaning, the evidence in the present case must be suppressed. A contrary result would lead to the "evaporation" of the constitutional rights of the Fourth Amendment.

It seems that the main concern of the dissenting justices is the ease with which individuals are able to access weapons, a concern which is well founded. However, the right to bear arms is not the issue in the present case; rather, we are

concerned with the right to be free from unreasonable searches and seizures. The effect of allowing a "firearms exception" would be the equivalent of saying that there are no unreasonable searches and seizures, and thus no Fourth Amendment rights, so long as the anonymous informant uses the magic word "firearm." To allow such an exception would threaten the basic protections of this nation's Constitution.[7]

KOGAN and ANSTEAD, JJ., concur.

OVERTON, J., dissenting.

The possession without authority of a concealed firearm by any individual in a public place or at a public event is a prescription for disaster, but the possession of a concealed firearm by a child is an especially dangerous and explosive situation. In deciding not to allow the stop and frisk in this case, the majority fails to follow the clear controlling precedent of this Court, and in addition expresses a holding contrary to the view of the overwhelming majority of jurisdictions that have considered the issue. In my view, the majority also makes a poor public policy decision that is dictated neither by the law

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[7] In his dissent, Justice Overton refers to the frisk as a "minimal privacy intrusion." To the contrary, as noted by the United States Supreme Court in Terry:

> [I]t is simply fantastic to urge that [a frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.

Terry, 392 U.S. at 16-17 (footnote omitted).

Justice Overton also focuses on the fact the defendant in the present case is a juvenile. It is important to point out that the "firearm exception" would apply to all citizens, not just juveniles.

nor by common sense. The majority decision is not only bad policy--I believe it threatens the physical safety of the law enforcement officers and citizens of this state. What must be remembered is that the Florida and United States constitutions protect against "unreasonable searches and seizures." Under the circumstances of this case, stopping and frisking this child and seizing the concealed weapon is not unreasonable.

The unfortunate reality of today's society is that dangerous persons of all ages stand armed and ready to shoot law enforcement officers and citizens. I am unable to ignore the daily headlines of our nation's newspapers and the statistics compiled by law enforcement agencies that reveal the great risk of harm posed by firearms in this country. According to the Uniform Crime Reports published by the Federal Bureau of Investigation, firearms claimed the lives of 92% of the 696 law enforcement officers killed in the line of duty from 1987 through 1996. Of those murders committed with firearms, 71% involved handguns--weapons that are easily concealed. Recent events have tragically demonstrated that children, such as the petitioner, and guns are an especially explosive mixture.[8] The violence involving firearms at our nation's schools is a

[8]Violent crime committed by juveniles continues to rise. FBI statistics presented to the United States House of Representatives show that the number of juveniles charged with murder increased 104 % from 1970 through 1992. 144 Cong. Rec. H226-27 (daily ed. Feb 3, 1998) (statement of Mr. Kingston). The number of juveniles arrested on weapons offenses has more than doubled over the past ten years. From 1965 through 1992, the number of twelve-year-olds arrested for violent crime rose 211 %; the number of thirteen and fourteen-year-olds arrested for such crime rose 301 %; and the number of fifteen-year-olds arrested for such crime rose 297 %. 143 Cong. Rec. H2,313-14 (daily ed. May 7, 1997) (statement of Mr. Solomon).

problem of major significance.[9] Unfortunately, the majority has virtually ignored the great harm caused by firearms and has lost sight of the fact that the rationale of Terry v. Ohio, 392 U.S. 1 (1968), is to protect law enforcement officers and the general public from the dangers associated with armed suspects.[10] It has also lost sight of a common sense definition of the term "unreasonable." The majority has acknowledged that the United States Supreme Court, in formulating the "reasonable suspicion" test under Terry, balanced the privacy interests of citizens with the safety interests of police officers and the public.[11] With respect to the circumstances presented

[9]Over the past two years, children as young as eleven years of age have shot classmates, teachers, and school administrators in cities such as Jonesboro, Arkansas; Bethel, Alaska; Olivehurst, California; Grayson, Kentucky; West Paducah, Kentucky; Pearl, Mississippi; Springfield, Oregon; Edinboro, Pennsylvania; Fayetteville, Tennessee; and Moses Lake, Washington. Undoubtedly, by the time this opinion is published, the list of cities where schoolyard homicides have occurred will have grown.

[10]In Terry, the Supreme Court wrote as follows:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry, 392 U.S. at 24.

[11]The Supreme Court wrote as follows:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the

in this case, Judge Posner of the Seventh Circuit Court of Appeals wrote that the balancing test involves "the right of the people to be let alone and their right to be protected from armed predators." United States v. DeBerry, 76 F.3d 884, 886 (7th Cir. 1996). I believe that a proper balancing of the interests demonstrates that the government's obligation to protect citizens and law enforcement personnel from violent crime substantially outweighs an individual citizen's interest against the limited privacy intrusion of a Terry stop and frisk. This Court is not the first to address this issue. I would follow the strong majority view and hold that when the police receive an anonymous tip alleging that a person is carrying an illegally concealed weapon and only the innocent details of the tip are verifiable, the police may conduct an investigatory stop and frisk of the suspect. See, e.g., United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996); United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992); United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1981); Speight v. United States, 671 A.2d 442 (D.C. 1996); United States v. Johnson, 540 A.2d 1090 (D.C. 1988); United States v. Mason, 450 A.2d 464 (D.C. 1982); State v. Webb, 398 So. 2d 820 (Fla. 1981); Hetland v. State, 387 So. 2d 963 (Fla. 1980); State v. Kuahuia, 616 P.2d 1374 (Haw. 1980); People v. Smithers, 415 N.E.2d 327 (Ill. 1980); Graham v. Commonwealth, 667 S.W.2d 697 (Ky. Ct. App. 1983); State v. Jernigan, 377 So. 2d 1222 (La. 1979); State v. Hasenbank, 425 A.2d 1330 (Me. 1981); Johnson v. State, 439 A.2d 607 (Md. Ct. Spec. App. 1982); Commonwealth v. Stoute, 665 N.E.2d 93 (Mass. 1996); Commonwealth v. McCauley, 419 N.E.2d 1072 (Mass. App. Ct. 1981); State in re H.B., 381 A.2d 759 (N.J. 1977); State v. Williams, 598 A.2d 1258 (N.J. Super. Ct. Law Div. 1991); People v. McLaurin, 374 N.E.2d 614 (N.Y. 1978); State v. Pulley, 863 S.W.2d 29 (Tenn. 1993); State v. Franklin, 704 P.2d 666 (Wash. Ct. App. 1985). Apparently, the only case that supports the majority's decision is Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997).

> protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Terry, 392 U.S. at 27.

To more fully explain my position, it is necessary to restate part of the facts in this case. The police received an anonymous tip that one of three young black males standing at a bus stop in front of a pawnshop at a specific and public location was carrying a concealed firearm. The tipster described the appearance of each of the young males and said that the individual with the gun was wearing a "plaid-looking" shirt. Officer Carmen Anderson, a police officer with more than fourteen years of experience, and another officer arrived at the scene only six minutes after receiving the anonymous complaint. The officers immediately verified the accuracy of all of the appearance and location information provided by the tipster. J.L. was standing by the bus stop with two other young black males and he was wearing a plaid shirt. Officer Anderson approached J.L., asked him to put his hands above his head, and conducted a pat-down of his outer garments. Officer Anderson then seized a gun that she saw protruding from J.L.'s left pocket. J.L. was taken into custody and charged with unlawfully carrying a concealed firearm[12] and possession of a firearm by a minor under eighteen years of age.[13]

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[12] § 790.01(2), Fla. Stat. (1995).

[13] § 790.22(3), Fla. Stat. (1995).

J.L.'s motion to suppress was granted by the trial court. The Third District Court of Appeal reversed, holding that the police had a reasonable suspicion that J.L. was carrying a concealed weapon. The district court stated that the investigatory stop and frisk was justified because the surrounding circumstances indicated to the officers that the anonymous tip was reliable. The district court noted that all of the information provided in the anonymous tip, except that relating to the concealed firearm, was verified by the police officers immediately upon their arrival at the scene. As to the inability of the police to verify the existence of the concealed firearm prior to the frisk, the district court stated that

> where a confirmed tip concerns an individual with a gun, the officer is faced with the choice of stopping and searching the individual, or waiting until the individual brandishes or uses the gun and the latter choice is unacceptable, thus leaving the stop and frisk as the only reasonable choice.

J.L., 689 So. 2d at 1118.

In reaching its decision, the district court appropriately relied upon this Court's decision in Hetland v. State, 387 So. 2d 963 (Fla. 1980), which expressly adopted the decision of the Second District Court of Appeal in State v. Hetland, 366 So. 2d 831 (Fla. 2d DCA 1979). In Hetland, the sheriff's deputies received an anonymous tip that Hetland was on his way to a local tavern to shoot someone. The tipster gave Hetland's description to the police and informed them that he was carrying a silver revolver. The deputies immediately proceeded to the tavern and identified Hetland sitting at the bar. "There was no commotion; all was quiet. [Hetland] was . . . sitting at the bar and there was nothing in his manner or actions which

was suspicious." Hetland, 366 So. 2d at 833 (emphasis added). One of the deputies asked Hetland to stand up. When Hetland complied, the deputy saw a gun protruding from Hetland's waistband. The weapon was seized and Hetland was arrested for carrying an illegally concealed firearm. The trial court suppressed the revolver as evidence. On appeal, the Second District Court of Appeal reversed, holding that the tip was sufficiently reliable to justify the investigatory detention and seizure. On review, this Court summarily approved of the decision of the district court and expressly adopted its opinion.

One year following our decision in Hetland, this Court again considered the issue of the validity of a stop and frisk based on an anonymous tip that concerned a concealed weapon. In State v. Webb, 398 So. 2d 820 (Fla. 1981), a bulletin was issued for the police to "be on the lookout" (BOLO) for a white male with specific physical features who was suspected of having committed two armed robberies on the two previous days. The BOLO was based on apparently anonymous information. The BOLO also provided that the suspect was carrying a black gun. Six hours after the BOLO was issued, the police saw Webb walking down a street approximately two miles from the scene of the robberies. Because Webb matched the description given in the BOLO, the officers conducted a stop and frisk of Webb and recovered a concealed firearm. Webb was arrested for carrying the concealed firearm. Webb was not charged with the robberies that he had been suspected of committing, but was charged with carrying an illegally concealed weapon. The trial court denied Webb's motion to suppress. On appeal, the district court reversed. This Court quashed the district court's decision, holding that the apparently anonymous information in the BOLO was specific and corroborated such that it bore sufficient indicia of reliability. In conclusion, we wrote as follows:

Under the totality of the circumstances, we hold that the stopping and the frisking of Webb was valid and that the trial court correctly denied the motion to suppress.

To hold otherwise would place in jeopardy the lives of police officers who have made a valid stop and who have reason to believe that the suspect is armed. As Justice Harlan stated in his concurring opinion in Terry v. Ohio, "[t]here is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." 392 U.S. at 33, 88 S. Ct. at 1886. Upon the information known to the officers, failure to have stopped Webb would "have been poor police work indeed," Terry v. Ohio, 392 U.S. at 23, 88 S. Ct. at 1881, and failure to frisk could have cost the officers their lives.

Webb, 398 So. 2d at 826.

Hetland and Webb clearly control the issue presented in this case and demand the same result. This Court in Hetland upheld the stop and frisk on material facts that are virtually identical to the facts of the present case, and this Court in Webb upheld the stop and frisk on facts that are notably weaker than the facts of the present case. The attempts of the majority to distinguish Hetland and Webb from the present case are wholly unpersuasive, and I fear that the majority opinion will confuse the law enforcement officers and trial judges who must confront the circumstances presented in this case on a daily basis. If the present majority of this Court is dissatisfied with

the decisions of prior majorities of this Court, then it should say so, and recede from Hetland and Webb. I, of course, maintain that Hetland and Webb reached proper conclusions.

The law is clear that a police officer may make an investigatory stop of a citizen if the officer has a reasonable suspicion that the individual is committing or is about to commit a crime. Terry. The "totality of the circumstances" test is used to determine whether the investigatory stop was supported by the requisite reasonable suspicion. Alabama v. White, 496 U.S. 325 (1990). If the officer has a reasonable suspicion that the detained individual is armed and dangerous to the officer or others, a limited frisk for weapons may be conducted. Terry; Minnesota v. Dickerson, 508 U.S. 366 (1993). The United States Supreme Court has deemed such a stop and frisk to be a "limited intrusion." Adams v. Williams, 407 U.S. 143, 148 (1972)(emphasis added). Under appropriate circumstances, an anonymous tip may carry sufficient indicia of reliability to justify an investigatory stop and frisk. White, 496 U.S. at 328. The reliability of the anonymous tip is based in part on the specificity of the information provided and the ability of police officers to quickly and independently corroborate significant aspects of the information. White, 496 U.S. at 331-32. The corroboration of only the innocent details of an anonymous tip concerning certain illegal activities, such as the sale or possession of drugs, is insufficient to provide police officers with a reasonable suspicion of criminal activity. See Robinson v. State, 556 So. 2d 450 (Fla. 1st DCA 1990). However, as stated by Professor LaFave:

> It must be recognized that stoppings for investigation are not all of one kind and that in some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information

> cannot be permitted to stand in the way of prompt police action.

4 Wayne R. LaFave, Search and Seizure § 9.4(h), at 229 (3d ed. 1996).

An anonymous tip concerning an individual with an illegally concealed firearm presents a unique situation. When confronted with this situation, police officers may not be able to verify more than the innocent details of the tip without substantially risking their safety or the safety of the general public. As stated by the Second Circuit Court of Appeals:

> The unique dangers presented to law officers and law-abiding citizens by firearms are well chronicled." [United States v. Clipper, 973 F.2d 944, 949-51 (D.C. Cir. 1992)]. An officer who is able to corroborate other information in an anonymous tip that another person is in actual possession of a gun is faced with an "unappealing choice." United States v. McClinnhan, 660 F.2d 500, 502 (D.C. Cir. 1981). He must either stop and search the individual, or wait until the individual brandishes or uses the gun. Id. at 502-503.

United States v. Bold, 19 F.3d at 104. I fully agree. To say that the officers in this case should have waited until this child did something more to arouse their suspicion is unreasonable. I fear that the "additional suspicious circumstances" required by the majority before the police may act will too often turn out to be the suspect's actual use of the unseen firearm. In light of the recent homicides committed by children, I suspect that the public's reaction to the majority's decision will be, "Where is your common sense?"

I would do what the majority of jurisdictions have done and recognize a "firearm exception" to the general rule that the corroboration of only the innocent details of an anonymous tip does not provide police officers with a reasonable suspicion of criminal activity. In my view, this holding is necessary because the great risk of harm to the public and police in such a situation substantially outweighs the limited privacy intrusion to the suspect. Such a holding is true to the dictates of Terry. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27 (emphasis added). Clearly, it is reasonable in today's society for law enforcement officers confronted with the circumstances presented in this case to conduct a stop and frisk.

I strongly emphasize that this holding should apply only to investigatory stop and frisks supported by reliable anonymous tips regarding individuals possessing illegally concealed firearms. As explained by the United States Court of Appeals, District of Columbia Circuit, the distinction between an anonymous tip involving a firearm and a tip involving possession of other contraband, such as illegal drugs, is significant:

> Th[e] element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in "controlled buys." Where guns are involved, however, there is the risk that an attempt to "wait out" the suspect might have fatal consequences.

United States v. Clipper, 973 F.2d at 951.

The anonymous tip in this case specifically described the appearance and location of a juvenile carrying a concealed firearm. The location was along a street where other members of the public were present. This fact raised the stakes for the officers because they had to worry about not only their own safety but also the safety of others nearby. The police officers, at least one of whom had substantial law enforcement experience, responded to the tip in a matter of minutes. The timing of their arrival ensured that the reported information was still fresh, thereby increasing the possibility that the officers would confront the suspect before any violence could occur and reducing the possibility that the officers would detain the wrong person. Upon arriving at the scene, the officers immediately verified all of the appearance and location information provided by the tipster. The only information the officers were unable to verify was J.L.'s actual possession of a concealed weapon. Officer Anderson conducted an investigatory stop and frisk of J.L. and seized a gun. This limited privacy intrusion was clearly reasonable and necessary for the protection of the officers and nearby members of the public. I would find that, under the totality of the circumstances, this anonymous tip concerning the illegal possession of a concealed firearm, corroborated by independent police work, justified the stop and frisk of J.L. Consequently, the seizure of the gun from J.L. would be valid. While the majority states that there is potential for abuse in recognizing a "firearms exception," I believe the potential for such abuse is minimal when compared to the harm that concealed firearms may cause to law enforcement and the general public. Accordingly, consistent with our decision in Hetland and Webb, and the decisions of the majority of jurisdictions that have considered the issue, I would approve the decision of the Third District Court of Appeal in this case

and disapprove Butts v. State, 644 So. 2d 605 (Fla. 1st DCA 1994).

WELLS, J., concurs.

WELLS, J., dissenting.

I join in the thorough and well-reasoned dissent of Justice Overton.

I write separately only to point out, contrary to the assertion of the concurring opinion, that my decision is not based upon a confusion between the right to bear arms and the right to be free from unreasonable searches and seizures. Rather, I conclude that to guard the constitutionally protected right to be free from unreasonable searches and seizures, this Court is not required to ignore the reality of what is happening daily in our country, our state, and in every local community of Florida.

The protection under scrutiny is against what is unreasonable. What is unreasonable has to be measured against what are the contemporary facts of life. I fault the majority because, in my judgment, it chooses to eliminate the word "unreasonable" from the Fourth Amendment. The majority's decision unnecessarily exposes many innocent residents of this state to severe harm from the violence of guns and without justification hinders law enforcement officers in their work to protect innocent residents. This simply does not have to be done to guard the Fourth Amendment.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Third District - Case No. 96-1860

Dade County

Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

for Petitioner

Robert A. Butterworth, Attorney General, and Roberta G. Mandel and Mark Rosenblatt, Assistant Attorneys General, Miami, Florida,

for Respondent

Supreme Court of Florida

TUESDAY, MARCH 9, 1999

J.L., a juvenile,	*	
	*	
Petitioner,	*	
	*	CASE NO. 90,361
vs.	*	
	*	
STATE OF FLORIDA,	*	District Court of Appeal,
	*	3rd District - No. 96-1860
Respondent.	*	
	*	

* * *** * * * * * * * * * * *

Respondent's motion for rehearing is hereby denied.

HARDING, C.J., SHAW and ANSTEAD, JJ., and KOGAN, Senior-Justice, concur.

WELLS, J., and OVERTON, Senior Justice, dissent.

A True Copy

TEST:

Sid J. White

TC

cc: Hon. Mary Cay Blanks, Clerk
Hon. Harvey Ruvin, Clerk
Hon. Steve Levine, Judge
Mr. Harvey J. Sepler

Clerk, Supreme Court Ms. Roberta G. Mandel
Mr. Mark Rosenblatt

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1997

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 96-1860

J.L., a juvenile, ** LOWER TRIBUNAL
CASE NO. 95-12143

Appellee. **

Opinion filed February 12, 1997.

An appeal from the Circuit Court of Dade County, Steve Levine, Judge.

Robert A. Butterworth, Attorney General, and Mark Rosenblatt, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, for appellee.

Before SCHWARTZ, C.J., and COPE and FLETCHER, JJ.

FLETCHER, Judge

The State appeals the trial court's order suppressing evidence (a firearm) seized from J.L. prior to his arrest. We review the determination de novo, Ornelas v. United States, ___ U.S. ____, 116 S.Ct. 1657, 133 L.Ed.2d 911 (1996), and, finding that the seizure was based upon reasonable suspicion of criminal activity, reverse.

The police received an anonymous complaint that a concealed weapon violation was taking place. The complainant told the police that the person who had the gun was one of several young black males standing by a bus stop in front of a pawnshop at a specific location. The complainant gave a description of each of them, advising that the male with the gun was wearing a plaid-looking shirt.

The description and location information given by the anonymous complainant was verified when the police arrived at the described location only six minutes after receiving the complaint. As the police approached the bus stop they saw three young black males as described, one of whom (J.L.) was wearing a plaid-looking shirt. One officer immediately approached J.L., asked him to put his hands up on the bus stop, and began frisking him, at which time she saw the butt of a gun protruding from his left pocket. The officer removed the gun from the pocket and, together with another officer, took J.L. into custody.

The State contends that once the police corroborated the anonymous complainant's information describing the persons and location, there was a reasonable suspicion on the part of the police officers that J.L. was carrying a concealed weapon and thus the seizure was valid. J.L. contends, on the other hand, that the trial court correctly suppressed the gun obtained from

him by the warrantless search as the anonymous complaint was uncorroborated and he, J.L., had displayed no suspicious activity which might have supported the anonymous complaint.

We conclude that the police officers were justified in having a reasonable suspicion that J.L. was committing a crime -- carrying a concealed weapon -- and thus in stopping and frisking him. A valid stop and frisk may be based on information obtained from an anonymous complainant (or "tipster") if that information appears sufficiently reliable because of the surrounding circumstances or the nature of the information given in the tip itself. Hetland v. State, 387 So. 2d 963 (Fla. 1980). Here, all of the complainant's information was verified by the police within minutes. The only item remaining to be verified was the existence of a weapon concealed in J.L.'s pocket, and, obviously, that could not be verified by mere observation. The police officers thus found themselves in a situation in which they had a reasonable suspicion -- based on the extent of the verification -- that J.L. was carrying a concealed weapon and they had to take some action, but in doing so, they also had to secure their own safety. This the officer did by the warrantless frisk. As noted by the United States Court of Appeals, Second Circuit, United States v. Bold, 19 F.3d 99 (2d Cir. 1994), cert. denied, ___ U.S. ____, 116 S.Ct. 2511, 135 L.Ed.2d 200 (1996), where a confirmed tip concerns an individual with a gun, the officer is faced with the choice of stopping and searching the individual, or waiting until the individual brandishes or uses the gun and the latter choice is unacceptable, thus leaving the stop and frisk as the only reasonable choice. We agree with that analysis.

As the officer had a reasonable suspicion of criminal activity that made valid the warrantless stop and frisk of J.L., the trial court's order granting the motion to suppress evidence is reversed and the cause remanded for further proceedings.

COPE, J., concurs.

SCHWARTZ, Chief Judge (specially concurring).

I concur in reversal because, somewhat to my surprise, the cases seemingly unanimously recognize a "firearm exception" to the rule that an anonymous tip which does not include predictive elements is insufficient to justify a Terry stop and frisk. See United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996); United States v. Gibson, 64 F.3d 617 (11th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1580, 134 L.Ed.2d 678 (1996); United States v. Bold, 19 F.3d 99 (2d Cir. 1994); United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992), cert. denied, 506 U.S. 1070, 113 S.Ct. 1025, 122 L.Ed.2d 171 (1993); United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1981); Speight v. United States, 671 A.2d 442 (D.C. App. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 375, 136 L.Ed.2d 264 (1996); State v. Hasenbank, 425 A.2d 1330 (Me. 1981); 4 Wayne R. LaFave, Search and Seizure § 9.4(h), at 229-30 & nn.404-06 (3d ed. 1996), and cases cited; see also State v. Hetland, 366 So. 2d 831 (Fla. 2d DCA 1979), approved, 387 So. 2d 963 (Fla. 1980)(rationale criticized at 4 LaFave, supra § 9.4(h) n.404). See generally State v. Williams, 371 So. 2d 1074 (Fla. 3d DCA 1979), cert. denied, 381 So. 2d 771 (Fla. 1980).

IN THE CIRCUIT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

JUVENILE DIVISION	ORDER	CASE NUMBER
		92-12143F2014
IN THE INTEREST OF:		D.O.B 10/3/79

Johnny Laguerre,

A CHILD(REN)

The Respondent's Motion to Suppress Evidence is hereby granted based on Butts v. State, 644 So.2d 605 (Fla.lDCA.1994).

It is further **ORDERED** that this Court shall retain jurisdiction of this cause for the purpose of making such further or other orders herein for the welfare of any child named herein as may be from time to time found necessary.

DONE AND ORDERED at Miami, Florida this 11 day of April, 1996.

STEVE LEVIN, CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
JUVENILE DIVISION

CASE NO. 95-12143 J014

IN THE INTEREST OF:
JOHNNY LAGUERRE,

Respondent.
_____/

March 28, 1996
Juvenile Justice Center
3300 Northwest 27 Avenue
Miami, Florida

The above-entitled cause came on for hearing before the Honorable STEVEN D. LEVINE, Circuit Judge, pursuant to notice.

APPEARANCES:

YVETTE REYES,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State.

ELAINE HILL-HOLLOWAY,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State.

ARTHUR MULLINS,
Assistant Public Defender,
Public Defender's Office,
on behalf of the Respondent.

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WITNESSES DIRECT CROSS REDIRECT RECROSS

Motion to Suppress

Officer Carmen Anderson (on behalf of the State)

By Ms. Reyes 3

By Mr. Mullins 8

(Thereupon, the tape recorder was turned on.)

MS. REYES: The State is ready to proceed on the motion to suppress.

THE COURT: Okay. Call your witnesses.

MS. REYES: Yvette Reyes for the State. The State calls Officer Anderson.

THE COURT: If you'll raise your right hand, please, Officer.

(Thereupon, the witness was duly sworn.)

MS. REYES: Just a moment, your Honor.

THEREUPON,

OFFICER CARMEN ANDERSON

was called as a witness on behalf of the State, and after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. REYES:

Q. Officer, would you please state your full name for the record.

A. Carmen Anderson [phonetic].

Q. And where are you presently employed?

A. Miami Lakes District.

Q. For Metro-Dade?

A. Yes.

Q. And were you so employed on October 13th, 1995?

A. Yes, I was.

Q. And how long have you been a police officer?

A. Fourteen-and-a-half years.

Q. Okay. Is that on routine patrol?

A. Yes.

Q. Okay. On October 13th, 1995, did there come a time when you came to know the Defendant, Johnny Laguerre?

A. Yes, I did.

Q. And can you please tell me what happened on that day?

A. Okay. Myself and another unit, which I don't recall who it was, were dispatched to the area of 183 Street and about Northwest 24th Avenue, by a bus stop that's there in front of a pawnshop. We were told by the anonymous complainant that there were several black males standing by the bus stop, and they gave a description of each one. The complainant advised that the male with the gun had a plaid-looking shirt and he was a black male. I don't recall what other information they gave us.

Q. Did you respond to that scene? How long after you got this call, did you respond to the scene?

A. About six minutes after.

Q. When you arrived on the scene, did you find the persons matching the description?

A. As we approached the bus stop, we saw three black males, one of which was wearing a plaid-looking shirt.

Q. What were the other two boys wearing?

A. I believe one was wearing like a tan polo shirt and another color top.

Q. Were you advised in the dispatch call whether it was an adult or a juvenile?

A. I believe they stated they were young.

Q. Okay. And they were at the bus stop?

A. Yes.

Q. At the same location?

A. Correct. In front of the pawnshop.

Q. Within minutes of the dispatch call?

A. Yes.

Q. Do you know who called?

A. No. They were anonymous.

Q. What did you do once you arrived?

A. When I arrived, I observed the three black males. The one fitting the description I approached first. I asked him to put his hands up on the bus stop. And when I -- as I started to frisk him, I saw the butt of a gun coming out of his left pocket.

Q. Before you approached him, was he doing anything, that you can recall, with his hands or -

A. No. They were just hanging out by the bus stop.

Q. What did you do once you searched him and you felt the bulge?

A. Well, as soon as I felt the bulge, I removed the gun from his pocket. And the other unit was there too, and we both took him into custody.

Q. Was he wearing a shirt over his pants or tucked

A. I think it was out, but it wasn't all the way down to where his pockets were hanging, 'cause his pants were hanging down low too.

Q. Could you see the bulge?

A. I could see the butt of the gun hanging out of his pocket. The butt was hanging out of this pocket.

Q. Okay. So you could see it.

A. Yes.

Q. You patted him down and you -- what kind of a gun was it?

A. It was a blue -- blue-steel gun. I don't remember if it was an automatic or a revolver. I think it was an automatic or automatic-looking type.

Q. Did you transport the Defendant?

A. No.

Q. Why not?

A. It was the end of my shift and I handed the call to another unit who was going to work later.

MS. REYES: May I have a moment, your Honor?

Q. (By Ms. Reyes) Officer, you just stated that you don't recall seeing them do anything prior to your approaching them.

A. Correct.

Q. Are you certain of that or is it that you don't remember?

A. No, I'm certain of that.

MR. MULLINS: Objection, Judge. Asked and answered.

THE COURT: Overruled.

MS. REYES: Excuse me, your Honor.

Q. (By Ms. Reyes) Just to clarify. When you actually saw the gun in the Defendant's pocket, when was that? At what point?

A. As soon as I started frisking him. As I headed down to the waist, waistline, I saw the pocket and I saw the gun butt hanging out of the pocket.

Q. So as you approached him, you didn't see the -

A. No.

Q. -- the gun butt at that time?

A. Correct.

Q. Did you find anything else on him?

A. No.

MS. REYES: Okay. I have no further questions at this point.

THE COURT: Cross.

MR. MULLINS: I just have a few questions, Judge.

CROSS-EXAMINATION

BY MR. MULLINS:

Q. Officer, there was another officer who responded at the same time. Is that correct?

A. Correct.

Q. And that officer patted down the other two individuals at the bus stop?

A. I believe so.

MR. MULLINS: Okay. I don't have any other questions.

THE COURT: Thank you, Officer. I appreciate your testimony. You can -- if you we'll call you back in and let you know what's happening.

Any other witnesses?

MS. REYES: No, your Honor. The State rests.

Supreme Court, U.S.
F I L E D
SEP 23 1999
CLERK

No. 98-1993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE STATE OF FLORIDA,

Petitioner,

-vs-

J.L., a juvenile,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, J.L., a juvenile, by and through undersigned counsel, moves this Court for leave to proceed *in forma pauperis* in the above-styled cause, pursuant to Rule 39 of this Court. Petitioner has been adjudicated indigent and permitted to proceed *in forma pauperis* by the courts of the State of Florida. Petitioner's affidavit of indigency in support of this motion is attached.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

BY: _____
HARVEY J. SEPLER
Assistant Public Defender
Counsel of Record for Respondent
Florida Bar No. 473431

10 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, JOHNNY LAGUERRE, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.
   DEC 1997 300 PER MO. (AVERAGE)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes X No ___

   a. If the answer is yes, describe the property and state its approximate value.
   1908 1989 HONDA ACCORD 500-

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: 9/22, 1999

(Signature)

Supreme Court, U.S.
FILED
SEP 20 1999
CLERK

No. 98-1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE STATE OF FLORIDA,

Petitioner,

-vs-

J.L., a juvenile,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

BENNETT H. BRUMMER
Public Defender

HARVEY J. SEPLER
Assistant Public Defender
Counsel of Record for Respondent

Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

QUESTION PRESENTED

Whether an anonymous tip providing only innocent details and lacking any of the recognized reliability indices can, *in and of itself*, provide police with a reasonable belief that the Respondent was engaged in criminality and that he was armed and dangerous?

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7 F.3d 26 (2d Cir. 1993), cert. denied , 510 U.S. 1169,
114 S. Ct. 1201, 127 L. Ed. 2d 549 (1994) 7

STATEMENT OF THE CASE

The Respondent accepts the characterization of the procedural and factual context of this case contained in the majority decision of the Supreme Court of Florida.

It should also be noted that the issue before all of the state courts below concerned the legal sufficiency of the anonymous tip, rather than the identity of the juveniles mentioned in the tip.

REASONS FOR DENYING THE PETITION

By its decision, the Supreme Court of Florida adhered to this Court's unbroken precedent that an anonymous tip which lacks any degree of inherent reliability will not support a warrantless stop and frisk. This is particularly true, the court held, 1) the tip contained only innocent details, 2) the police elected not to attempt further investigation and 3) the state failed to show that the Respondent's conduct placed anyone at risk.

The Petitioner urges that the mere mention of a weapon elevates an otherwise-insufficient anonymous tip to grounds for reasonably believing the suspect is armed, dangerous and engaged in criminality. It further argues that the corroboration of innocent details, coupled with the "statistical likelihood that the gun was illegal" and the inherent threat to safety, made the officers' actions necessary.[1] See Pet. at 15.

It is important to note, at the outset, that the stop and frisk in this case were predicated *solely* on the anonymous tip. That is, other than verifying that these were the same people as were mentioned in the tip, police made no independent investigation and they never observed any suspicious circumstances to bolster the information contained in the tip.

As for the tip, it contained only innocent details. The anonymous caller told

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[1] There was no mention of the "statistical likelihood" or the inherent risks arguments at trial or in prior appellate proceedings and, as such, no evidentiary support for them appears in the record.

police that three black boys were standing by a specific bus stop near a pawn shop and that one of the boys (the one wearing a plaid-looking shirt) had a gun. The police couldn't recall whether the tipster was an adult or juvenile, male or female. They never asked whether the tipster bore any special relationship to the three boys and how the tipster knew about the gun. The record does not reveal whether the tip and subsequent stop occurred on a weekday or weekend, during or after business hours, and whether or not other people were in the area.

The tip contained no predictive features that might convey that the caller possessed knowledge about the boys not available to a mere passerby on the street.

Six minutes after receiving the tip, police arrived at the named location. They saw boys matching the anonymous caller's descriptions and, without asking any questions or seeing anything suspicious about the boys' presence or conduct, stopped them and frisked for weapons.[2] Interestingly, as noted by the state supreme court, police searched all three boys -- even though the tip concerned only the boy wearing the plaid-looking shirt. See Pet. at A-2.

After carefully applying this Court's decisions on stops and searches, the Supreme Court of Florida held that the tip lacked sufficient reliability to justify "active intervention into an otherwise peaceful situation and did not warrant a frisk

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[2] Thus, the only information provided by the tip and corroborated by police concerned the identity of the boys (a matter that was never at issue in the suppression hearing).

until some observable suspicious conduct took place." See Pet. at A-9.

That is, while police may rely on "presently occurring innocent detail [anonymous] tips" to call attention to a possible crime, they may not use them as the sole basis for effecting the stop and frisk. See Pet. at A-6. There must be something more than the tip to justify a reasonable belief that the suspect is engaged in criminality and is armed and dangerous.

For example, the supreme court reasoned, police must conduct some type of independent investigation to verify non-innocent details or they must observe suspicious circumstances that arouse their safety concerns. The police in this case limited their investigation to corroborating innocent details and they admitted to the absence of suspicious conduct or circumstances. In fact, the court held, "there was nothing [in this situation] to prevent the police from engaging in a consensual encounter with the trio or from questioning them concerning their possession of a weapon as reported in the anonymous tip." See Pet. at A-9.

Finally, the court reasoned, there was nothing in this record to warrant the recognition of a firearms exception to the Fourth Amendment. See Pet. at A-11. Despite the Petitioner's argument that the concerned officers had no alternative than to effect an on-the-spot stop and frisk, support for this is noticeably absent from the record.

The state supreme court's arguments are entirely consistent with established

law. In Terry v. Ohio,[3] for example, this Court upheld a stop and weapons search where police reasonably suspected that Terry had committed, was in the process of committing or was about to commit a crime. Moreover, the Court held, where the officer reasonably believed the suspect was armed and dangerous, he was authorized to conduct a frisk of the suspect's outer clothing.

The reasonableness of the officer's suspicions and beliefs are measured according to a "totality of the circumstances" test,[4] and while anonymous tips have, on occasion, provided a sufficient basis to engender a reasonable suspicion or belief, the tip must have inherent reliability.

In Alabama v. White,[5] this Court explained that the two main factors used to test the reliability of an anonymous tip are 1) the tipster's relationship either to the suspect or the alleged crime and 2) the nature of the information contained in the tip.[6]

> Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the "totality of the circumstances -- the whole picture.
>
> . . .
>
> [I]f the tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.

496 U.S. at 330.

In this case, the anonymous tip referred only to innocent, presently occurring details (sex, race, number, location and clothing -- information available to anyone passing the boys on the street).[7] Moreover, the tipster gave no suggestion of bearing a special relationship with the boys that would allow intimate knowledge of the presence of a gun. As a result of its diminished reliability, the tip could hardly justify a reasonable suspicion of criminality or a reasonable belief that anyone was in danger.[8]

The Petitioner urges that although much of the supreme court's opinion is consistent with established law, the law should bend when the anonymous tip alleges the presence of a firearm. Citing to a number of federal and state cases involving firearm-possession tips (only some of which are anonymous), the

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3 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

4 See, e.g., Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); United States v. Cortez, 449 U.S. 41, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

5 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

6 See also Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

7 See also United States v. Kent, 691 F.2d 1376 (11th Cir. 1982), cert. denied, 462 U.S. 1119, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983); United States v. McLeroy, 584 F.2d 746 (5th Cir. 1978).

8 Such inherently low reliability is accentuated by the absence of predictive qualities to the tip. See, e.g., Alabama v. White, 496 U.S. at 332, 110 S.Ct. at 2417.

Petitioner argues that the instant decision is in conflict with the emerging trend in the law.

In fact, many of these cases cited do not conflict with this decision. Nearly all of them involve a *combination* of factors, rather than solely the contents of anonymous tip, to support the suspicion of criminality and the public safety concern.

There, the officers' concerns were aroused not only by the tips, but by suspicious behavior or made furtive movements,[9] knowledge of the suspect's prior dangerous or threatening behavior,[10] or corroboration of predictive features of the tips -- all of which gave the tips an additional measure of credibility.[11]

Contrary to the Petitioner's understanding, and over and above the isolated cases to the contrary, the trend in the law is *not* to find that an anonymous firearms-possession tip, containing only innocent presently occurring details, is alone sufficient to satisfy the reasonableness test for police stops and frisks. Even if this Court were inclined to create new exceptions to the Fourth Amendment, this case is not the best candidate for doing so.

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9 See, e.g., United States v. Bold, 19 F.3d 99 (2d Cir. 1993), cert. denied, 517 U.S. 1250, 116 S.Ct. 2511, 135 L.Ed.2d 200 (1996); United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996).

10 See, e.g., State v. Hasenbank, 425 A.2d 1330 (Me. 1981); see also United States v. Gibson, 64 F.3d 617 (11th Cir. 1995), cert. denied, 517 U.S. 1173, 116 S.Ct. 1580, 134 L.Ed.2d 678 (1996) (police knew there were as many as forty people inside the establishment where the gun was reported to be).

11 See, e.g., United States v. Walker, 7 F.3d 26 (2d Cir. 1993), cert. denied , 510 U.S. 1169, 114 S.Ct. 1201, 127 L.Ed.2d 549 (1994); United States v. Kent, 691 F.2d 1376 (11th Cir. 1982), cert. denied, 462 U.S. 1119, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983).

CONCLUSION

For these reasons, the Respondent respectfully prays that this Court deny the Writ of Certiorari.

Respectfully submitted,

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No. 98-1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE STATE OF FLORIDA,

Petitioner,

-vs-

J.L., a juvenile,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief In Opposition has been served on counsel for Petitioner by United Parcel Service addressed to the Office of the Attorney General, 110 Tower, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, this 17th day of September, 1999.

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Dec 23 1999

Supreme Court, U.S.
FILED
DEC 23 1999
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(5)

CASE NO. 98-1993
IN THE UNITED STATES SUPREME COURT
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THE STATE OF FLORIDA,
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vs.

J.L., a juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location, with a detailed description of the person and his attire, is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip?

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AN ANONYMOUS TIP WHICH STATES THAT A PERSON IS CARRYING A CONCEALED FIREARM AT A SPECIFIC LOCATION, WITH A DETAILED DESCRIPTION OF THE PERSON AND HIS ATTIRE, IS SUFFICIENTLY RELIABLE TO JUSTIFY AN INVESTIGATORY DETENTION AND FRISK WHERE THE POLICE IMMEDIATELY VERIFY THE ACCURACY OF THE TIP.

A. A *Terry* stop and frisk is justified by the totality of the circumstances, where an anonymous tip relates both innocent facts, verified immediately, and the carrying of a concealed firearm.

B. The anonymous tip was sufficiently reliable to justify the investigatory detention and frisk.

CONCLUSION 23

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CASE NO. 98-1993
IN THE UNITED STATES SUPREME COURT
October Term 1999

THE STATE OF FLORIDA,
Petitioner,

vs.

J.L., a juvenile,
Respondent.

OPINIONS BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *J.L. v. State*, 727 So.2d 204 (Fla. 1998).[A-1].[1] The decision of the District Court of Appeal of Florida, Third District is reported at 689 So.2d 1116. [A-31]. The trial court's order granting the motion of Respondent, J.L., to suppress the evidence is not reported.[A-35].

JURISDICTION

The Supreme Court of Florida's opinion was filed on December 17, 1998 and rehearing was denied on March 9, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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[1] Petitioner's motion to dispense with the joint appendix was granted by the Court. Thus, the symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, § 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent, J.L., was the Petitioner in the Supreme Court of Florida. The facts of the case were established in the evidentiary hearing held by the trial court on Respondent's motion to suppress a firearm. Based on Respondent's possession of the gun, a petition for delinquency was filed, charging Respondent with unlawfully carrying a concealed firearm and unlawful possession of a firearm by one under 18 years of age. [A-19].

The sole witness at the evidentiary hearing on the motion to suppress was Officer Carmen Anderson, a fourteen year veteran of the Miami-Dade Police Department. [A-40] The officer's uncontroverted testimony established:

1. On October 13, 1995 she was on routine patrol. [A-40].

2. She received a call from her dispatcher regarding an anonymous tip. [A-40].

3. Based on information received from the anonymous tipster, she was then dispatched to the area of 183rd Street and 24th Avenue in Miami. [A-40].

4. The details of the tip were that there were several young black males standing at a bus stand in front of a pawn shop, one of whom was carrying a concealed firearm. [A-40-41].

5. Each young black male was particularly described. [A-40].

6. The individual carrying the firearm was described as a black male with a plaid shirt. [A-40].

7. Officer Anderson and another unit arrived at the bus stop approximately six minutes after receiving the dispatch. [A.-41].

8. Officer Anderson saw three black males, who were found at the location where the anonymous informant said they would be, each of whom fit the description provided in the tip, including one of whom was wearing a plaid shirt. [A-41].

9. Officer Anderson immediately went to the black male fitting the description of the one who was carrying a concealed firearm and asked the black male with the plaid shirt to place his hands on the bus stop. [A-42].

10. Officer Anderson immediately began to frisk him and she saw the butt of a gun coming out of his left pants pocket. She removed the gun and arrested Respondent. [A-44].

The trial court found the evidence was insufficient to support a reasonable suspicion of criminal activity and suppressed the gun. [A-35-36].

The State of Florida, appealed the suppression order to the District Court of Appeal of Florida, Third District. The court reversed the trial court's granting of the motion to suppress and concluded that there was reasonable suspicion that Respondent committed the crime of carrying a concealed firearm, thus justifying the stop and frisk of the juvenile. The Third District held that the police officers found themselves, based on the extent of verification, in a situation in which they had a reasonable suspicion that Respondent was carrying a concealed weapon. In order to investigate criminal misconduct and to secure their own safety, the police officer carried out a warrantless frisk. Agreeing with the analysis stated by the court in *United States v. Bold,* 19 F.3d 99 (2nd Cir. 1994), the court concluded, where a confirmed tip concerns an individual with a gun, the officer should not be required to make a choice between stopping and searching the individual, or waiting until the individual brandishes or uses the gun. Since the latter choice is almost always unacceptable, the police officer has no choice but to stop and frisk. [A-31-34]. *State v. J.L.*, 689 So.2d 1116 (Fla. 3d DCA 1997).

The Supreme Court of Florida, in *J.L. v. State*, 727 So.2d 204 (Fla. 1998), quashed the decision of the lower court admitting the

gun, based on its determination that reasonable suspicion can never be established by an anonymous tip which provides only innocent details, and upon investigation only the innocent details are verified. The court held that anonymous tips can provide the basis for reasonable suspicion only when it can be established that the tip is reliable. Reliability of an anonymous tip can be established when the tip describes suspicious details concerning conduct that is presently occurring or is about to occur in the future and such conduct is verified by the police. Reliability of an innocent details tip can be established if the tip predicts particular future action which is verified by the police. If an innocent details tip does not concern future action, then reasonable suspicion can be established by verification of a presently occurring innocent details tip coupled with an independent police investigation which would have to uncover something more that just a verification of the innocent details. [A-4-9]. *Id.* at 206-208.

Based on the foregoing facts, the court held that the instant stop and frisk was unreasonable because the police officer's independent investigation only corroborated the innocent details and did not establish that the suspect was engaging in suspicious behavior. The court then suggested that the police officer involved should have used a less intrusive means, such as a consensual encounter, to determine if the suspect was armed and dangerous before a frisk would have been justified. The court also suggested a more reasonable approach was to wait until some observable suspicious conduct took place in order to justify the frisk. The court based its holding on *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and held that to approve the instant stop and frisk would create a "firearm exception" to *Terry*, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleged that an individual is carrying a firearm. The court rejected the so called "firearm exception" because it was unwilling to carve out a new exception from the original exception recognized in *Terry*. [A-9-11]. *Id.* at 208-209.

The dissent found the majority's interpretation of *Terry* was overly restrictive and erroneous because an anonymous tip concerning an individual with an illegally concealed firearm presents a unique situation. When confronted with this situation, police officers may not

be able to verify more than the innocent details of the tip without substantially risking their safety or the safety of the general public. If police officers are not allowed to stop and frisk such an individual, they must then wait until the individual brandishes or uses the gun before they can act. The dissent found this was unreasonable because the additional suspicious circumstances that the majority required before the police may act will too often turn out to be the suspect's actual use of the unseen firearm. [A-24]. *Id.* at 214.

The dissent would have joined the majority of jurisdictions that have recognized a "firearm exception" to the general rule that the corroboration of only the innocent details of an anonymous tip do not provide police officers with reasonable suspicion of criminal activity. The necessity of such a holding is self evident: it simply and wisely abates the great risk of harm to the public and police in such a situation and, substantially outweighs the limited privacy intrusion to the suspect. The dissent believed such a holding is true to the dictates of *Terry* which does not require that the officer be absolutely certain that the individual is armed but rather whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. The dissent, in urging affirmance, finally opined that it is clearly reasonable in today's society for law enforcement officers confronted with the circumstances in this case to conduct a stop and frisk. [A- 19]. *Id.* at 215.

SUMMARY OF ARGUMENT

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) teaches that a stop and frisk must be supported by reasonable suspicion that the individual stopped is engaged in criminal activity. Reasonable suspicion is established by the totality of the circumstances, taking into account both the content of information possessed by police and its degree of reliability. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).

In this case, the totality of the circumstances includes the officer's confirmation of all the anonymous tip information, the report that one of the individuals possessed a gun and the statistical likelihood that the gun was illegal. As a result, the officer had a reasonable suspicion under *Terry* to stop and frisk the Respondent. To require police, in situations where there is an anonymous tip that a specific individual is unlawfully carrying a firearm not observed by police officers, to wait for the brandishment or use of the firearm before finding reasonable suspicion effectively negates the *Terry* doctrine. Thus, in the instant situation, where innocent details of the anonymous tip are immediately verified, reasonable suspicion exists that the individual is committing a crime. Therefore, *Terry* permits a contemporaneous stop and frisk since the evidence of criminality is the concealed firearm which also supports a reasonable belief that the individual is armed and dangerous.

This holding is in accordance with the Court's prior cases that have recognized that the easy availability of firearms has made police investigations fraught with the possibility of dealing with armed and dangerous suspects. Thus, in order to lessen the impact of such danger, the Court, where there is a possibility that a firearm could be involved, has permitted *Terry* stops and frisks with less corroboration than when a firearm was not involved.

The application of this rule of law to the instant factual situation establishes that there was reasonable suspicion to believe that Respondent was committing the crime of carrying a concealed firearm. The anonymous tip provided the exact location and descriptions of the

three young, black males, including Respondent, and that Respondent descriptively dressed, was carrying a concealed firearm. The police officer immediately verified that the three juveniles were at the described location and appeared as described. At that time, the reliability of the tip was established and the police officer had reasonable suspicion to detain Respondent and concomitant therewith to frisk Respondent because he was armed and dangerous. In accordance with Florida law, Respondent could never be lawfully in possession of a firearm. This fact is undisputed because at the time of the offense Respondent was sixteen years old and he could not lawfully possess a firearm until he was eighteen and he could not get a permit to carry a concealed firearm until he was twenty-one years old.

ARGUMENT

AN ANONYMOUS TIP WHICH STATES THAT A PERSON IS CARRYING A CONCEALED FIREARM AT A SPECIFIC LOCATION, WITH A DETAILED DESCRIPTION OF THE PERSON AND HIS ATTIRE, IS SUFFICIENTLY RELIABLE TO JUSTIFY AN INVESTIGATORY DETENTION AND FRISK WHERE THE POLICE IMMEDIATELY VERIFY THE ACCURACY OF THE TIP.

This case provides the Court with the opportunity to answer the question left open in *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990): whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location, with a detailed description of the person and his attire, is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip? America today has unlimited access to all kinds of weapons. With the increased access to weapons both the police and the public have a right to be protected from those who would do harm with a weapon. In determining whether a search or seizure is reasonable under the Fourth Amendment, the rights of the citizen's, both the police and the general public, are weighed against the intrusion on the individual's privacy. Thus, when a concealed firearm is the basis of an anonymous tip of criminal activity, the Fourth Amendment requires that the balance be in favor of the safety of the police and the public.

It is well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause, *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), is that a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articuable facts that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Court recognized that a police officer making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. Thus, when the officer is

justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and dangerous to the officer or others, he may conduct a limited protective search for concealed weapons. 392 U.S. at 24, 88 S.Ct. at 1881. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons is equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. *See: Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).

The Supreme Court of Florida held that the instant stop and frisk, was *per se* unreasonable because the police officer's independent investigation only corroborated the innocent details and did not establish that the suspect was engaging in suspicious behavior. A majority of the court suggested that in this type of situation the police officer involved should have used a less intrusive means, such as a consensual encounter, to determine if the suspect was armed and dangerous before a frisk would be justified. The court's more reasonable approach was to wait until some observable suspicious conduct took place in order to justify the frisk. The court held that to approve the instant stop and frisk would create a "firearm exception" to *Terry*, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleged that an individual is carrying a firearm. [A-4-11].

The issue squarely fits within the unanswered question in *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990) as to whether an anonymous tip which states that an individual is carrying a concealed firearm may provide the necessary reasonable suspicion to support an investigatory detention and frisk where the innocent details of the tip are immediately verified. The general rule that corroboration of only the innocent details of an anonymous tip does not provide police officers with reasonable suspicion of criminal activity is unrealistic when a weapon is involved. Where, as here, the corroboration of only the innocent details of an anonymous tip are tied directly to the tipster's assertion that a weapon is involved, the requisite reasonable suspicion of criminal activity exists. The quantum of facts necessary to provide

reasonable suspicion where there is an anonymous tip that an individual is unlawfully carrying a concealed firearm does not require further corroboration since the great risk of harm to the public and police in such a situation substantially outweighs the limited privacy intrusion to the suspect.

A. A *Terry* stop and frisk is justified by the totality of the circumstances, where an anonymous tip relates both innocent facts, verified immediately, and the carrying of a concealed firearm.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court examined the validity of a "stop and frisk" in the absence of probable cause and a warrant. In *Terry*, the police officer, after briefly observing several suspects, formed the conclusion that they were about to engage in criminal activity. The officer then detained the suspects and fearing they were armed, patted down the outside of their clothing and discovered firearms. The reasonableness of the officer's conduct was determined by balancing the need to search or seize against the invasion which the search or seizure entailed. Although the Court found that the conduct of the officer involved a "severe, though brief, intrusion upon cherished personal security," 392 U.S. at 24-25, 88 S.Ct. at 1881-1882, the Court also found that the conduct was reasonable when it weighed the interest of the individual against the legitimate interest in "crime prevention and detection," *Id.* at 22, 88 S.Ct. at 1880, and the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where probable cause is lacking for an arrest." *Id.* at 24, 88 S.Ct. at 1881. The Court then held that when the officer has a reasonable belief "that the individual whose suspicious behavior he is investigating at close range is armed and dangerous to the officer or others, it would appear clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Ibid.* One of the reasons the Court found that made the foregoing reasonable was its recognition of

the easy availability of firearms to potential criminals in this country. *Id*, at 24 n. 21, 88 S.Ct. at 1881 n. 21.[2]

The Court then explained that in approving the reasonableness of the stop and frisk involved, the Court "need not develop at length in this case, however, the limitation which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." *Id.* at 29, 88 S.Ct. at 1884.

In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 607 (1972), the Court approved a frisk for weapons as a justifiable response to an officer's reasonable belief that he was dealing with a possibly armed and dangerous suspect. In *Adams*, the police officer, who was alone early in the morning on car patrol in a high crime area, received information from a known informant that an individual seated in a nearby vehicle was carrying narcotics and had a gun in his waist. The officer then approached the vehicle and asked Williams to open the door. When Williams rolled down the window instead, the officer reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to the officer from outside the car, but it was in precisely the place indicated by the informant.

Before applying *Terry*, the Court succinctly rephrased the applicable legal principles: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146, 92 S.Ct. at 1923.

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[2] Justice Douglas in his dissenting opinion in *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), after acknowledging that Connecticut allows its citizens to carry concealed firearms, recognized that the real problem is not with the Fourth Amendment but with the ease with which anyone can acquire a handgun. Justice Douglas advocated strict gun control laws as the method to insure police officer safety when investigating suspicious activity as opposed to granting the police further authority to intrude upon the rights of the people.

The Court then found that the officer acted justifiably in responding to his informant's unverified tip. This holding was based on the fact that the informant was known to the officer and provided reliable information in the past and that the innocent details of the tip were immediately verified. Thus, the Court found that the information carried enough indicia of reliability to justify the officer's forcible stop.[3] The Court recognized that this factual scenario presented a stronger case than an anonymous tip because the tipster exposed himself to criminal liability for making a false complaint. However, the Court did not decide whether under a different factual scenario, an anonymous tip containing the same details as the one therein would be sufficient to justify a forcible stop. *Id.* at 146-147, 92 S.Ct. at 1923-1924.

Williams' contention that reasonable suspicion for a stop and frisk can only be based on the officer's personal observation was rejected. The Court held that "[i]nformant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation." *Id.* at 147, 92 S.Ct. at 1924.

Since *Terry*, a central theme, in developing any Fourth Amendment limitations on protective searches and seizures for weapons, is the protection of the police officers and protection of the public in general.

In two cases, the Court recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers. In *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), the Court held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons if there is a reasonable belief that they are

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[3] Although it was lawful in Connecticut to carry a concealed firearm, the Court rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law. *Id.* at 146, 92 S.Ct. at 1923. This position was reaffirmed in *Michigan v. Long*, 463 U.S. 1032, 1052 n. 16, 103 S.Ct. 3469, 3482 n.16, 77 L.Ed.2d 1201 (1983).

armed and dangerous. This decision was based on the fact that establishing a face-to-face confrontation after the stop diminishes the substantial possibility that the driver can make unobserved movements and thus reduces the likelihood that the officer will be the victim of an assault. In *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), the Court held that the *Mimms* rule applies to passengers as well as to drivers. Even though a passenger has a greater personal liberty interest than a driver since the passenger is not being stopped for a traffic violation but only because he is a passenger in a vehicle that has been lawfully stopped, *Mimms* was extended to passengers based on officer safety concerns. The Court reasoned that the possibility of a violent encounter stems from the fact that evidence of a more serious crime might be uncovered during a stop and once outside the car, the passengers, who would have same motivation as the driver to use violence to prevent apprehension of such a crime, would be denied access to any possible weapon concealed in the interior of the passenger compartment.

In a number of cases, the Court has expressly recognized that suspects may harm police officers and others by having access to weapons, even though they are not themselves armed. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), involved the limitations imposed on police authority to conduct a search incident to a valid arrest. Relying explicitly on *Terry*, the Court held that when an arrest is made, it is reasonable for the arresting officer to search "the arrestee's person and the area 'within his immediate control' -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763, 89 S.Ct. at 2040. The Court reasoned that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Ibid.* In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court held that "articles inside the relatively narrow compass of the passenger compartment of a automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon'..."*Id.* at 460, 101 S.Ct. at 2864. The Court also held that the police may examine the contents of any open or closed container found within the passenger compartment, "for if the passenger

compartment is within the reach of the arrestee, so will containers in it be within his reach." *Ibid.* (Footnote omitted).

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court extended *Chimel* and *Belton* to a *Terry* stop finding that the same safety concerns that permits area searches incident to an arrest, that the arrestee who may not be armed may be able to gain access to weapons to injure officers or others, is present during an investigatory detention. The Court held that when there is reasonable suspicion to stop a suspect while he is driving, a search of the passenger compartment of the automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences therefrom, reasonably warrants the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. *Id.* at 1049, 103 S.Ct. at 3481.

In *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), the Court applied *Terry* and *Long* to protective sweeps made in conjunction with an in-home arrest. In protective sweep situations, the police have an interest in taking steps to assure themselves that the arrestee's house was not harboring other persons who were dangerous and who could unexpectedly launch an attack and thus the police can, without probable cause or a reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest. The Court found that this would strike the proper balance between officer safety and citizen privacy. *Id.* at 334, 110 S.Ct. at 1098. The protective sweep situation, the Court found, is analogous to *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), which held that, although armed with a warrant to search a bar and bartender, the police could not frisk the bar's patrons absent individualized, reasonable suspicion that the person to be frisked was armed and presently dangerous.

In *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the Court held that the "totality of the circumstances" test is to be used to determine whether the investigatory stop is supported by the requisite reasonable suspicion.

The anonymous tip in *White* contained innocent details and a prediction of future events concerning the possession of illegal narcotics. The tip was found to be reliable because the future events were observed by the police. The Court recognized that "[t]his is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop." *Id.* at 329, 110 S.Ct. at 2416. In discussing the concept of reasonable suspicion, the Court stated that "[r]easonable suspicion, like probable cause, is dependent upon both the content of the information possessed by the police and its degree of reliability. Both factors--quantity and quality--are considered in the 'totality of the circumstances--the whole picture,' that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* at 330, 110 S.Ct. at 2416.

The concern for officer safety based on the easy availability of firearms, regardless of the merits of gun-control proposals, is greater today than when *Terry*[4] was decided in 1968. Today, forty-two (42) states[5] and the District of Columbia[6] allow, through license

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[4] In *Terry*, the Court found that the easy availability of firearms was relevant to the assessment of the need for some form of self-protective search power once reasonable suspicion existed for the detention. *Terry v Ohio*, 392 U.S. 1, 24 n. 21, 88 S.Ct. 1868, 1881 n. 21, 20 L.Ed.2d 889 (1968).

[5] Ala. Code § 13A-11-75 (1999); Alaska Stat. § 18.65.700-790 (1999); Ariz. Rev. Stat. § 13-3122 (1999); Ark. Code Ann. §5-73-311 (1999); Cal. Penal Code §12050 (1999); Colo. Rev. Stat. §18-12-105.1 (1998); Conn. Gen. Stat. § 29-28 (1999); Del. Code Ann. tit. 11 § 1441 (1998); Fla. Stat. Ch 790.06 (1999); Ga. Code Ann. § 16-11-129 (1999); Haw. Rev. Stat. § 134-9 (1999); Idaho Code §18-3302 (1999); Ind. Code § 35-47-2-3 (1999); Iowa Code § 724.4 (1997); Ky. Rev. Stat. Ann. § 237.110 (1998); La. Rev. Stat. Ann. §40:1379.3 (1999); Me. Rev. Stat. Ann. tit. 25 §2003 (1998); Mass. Gen. Laws ch. 140 § 131 (1999); Mich. Comp. Laws §28.93 (1999); Minn. Stat. §624.714 (1998); Miss. Code Ann. § 45-9-101 (1999); Mo. Rev. Stat. § 571.090 (1998); Mont. Code Ann. §45-8-321 (1999); Nev. Rev. Stat. § 202.3657 (1998); N.H. Rev. Stat. Ann. § 159:6 (1999); N.J. Rev. Stat. §

or permit regulatory schemes which impose age limitations, lack of prior convictions and other personal history requirements, their citizens to carry concealed firearms. Vermont permits its' citizens to carry concealed firearms without any regulation.[7] Only seven (7) states, Illinois, Kansas, Maryland, Nebraska, New Mexico, Ohio, and Wisconsin, totally prohibit their citizens from carrying concealed firearms.[8]

In light of these facts, the answer to the question left unanswered in *White,* is even more relevant today, specifically: whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location, with a detailed description of the person and his attire, is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip? *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990)

The State submits that the answer is yes. Such a tip concerning a concealed firearm, can be deemed sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip. In such a concrete factual situation, the immediate verification of the innocent details of the tip and the safety of the officer and others can provide the reasonable suspicion to support the stop and frisk of the individual. Once the tip's innocent details of location and description have been immediately verified by the police officer, the tip's degree of reliability increases to the point where a reasonable and prudent officer should not have to wait for the predictive future event to occur, to wit: the brandishing and possible discharge of the firearm. This holding would be in accordance with the principle that the Fourth Amendment proscription against unreasonable searches and seizures is not to be read in a vacuum, and thus, a search and seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).[9]

The Florida court rejected this rule of law. Instead, the court established a *per se* rule of law that an anonymous tip, when only the innocent details are verified, can never the provide the necessary reasonable suspicion to support a stop and frisk. The court based this holding on the following grounds: (1) the anonymous tip was unreliable because it did not involve suspicious behavior which the police could have verified as suspicious upon arrival at the scene; (2) the innocent details provided in the tip did not involve future action for which the police could verify whether or not such future action would occur: and, (3) the presently occurring innocent detail tip was not corroborated through an independent investigation on the part of the

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2C:58-4 (1999); N.Y. Penal Law § 400.00 (Consol. 1999); N.C. Gen. Stat. § 14-415 (1999); N.D. Cent. Code §62.1-04-03 (1999); Okla. Stat. tit. 21 § 1290.3 (1999); Or. Rev. Stat. § 166.291 (1999); 18 Pa. Cons. Stat § 6109 (1999); R.I. Gen. Laws §11-47-11 (1999); S.C. Code Ann. § 23-31-210 (1998); S.D. Codified Laws § 23-7-8 (1999); Tenn. Code Ann. § 39-17-1351 (1999); Tex. Gov't. Code Ann. § 411.172 (1999); Utah Code Ann. § 53-5-704 (1999); Va. Code Ann. § 18.2-308 (1999); Wash. Rev. Code §9.41-070 (1999); W.Va. Code § 61-7-4 (1999), and Wyo. Stat. Ann. § 6-8-104 (1999).

[6] D.C. Code § 22-3206 (1999).

[7] Vt. Stat. Ann. tit. 13 § 4003 (1999).

[8] Maryland, Nebraska, New Mexico and Ohio prohibit the possession of concealed firearms but allow their citizens charged with the offense of carrying a concealed firearm to present the affirmative defense that the possession was necessary for self defense. See Md. Code art. 27 § 36 (1999); Neb. Rev. Stat. §28-1202 (1999); N.M. Stat. §30-7-2 (1999); Oh. Stat. §2923.12 (1999).

[9] In accordance with this principle of law, Petitioner agrees that if an innocent detail tip, such as the one herein, deals with illegal narcotics or other nonthreatening contraband and not a firearm, then reasonable suspicion would not ordinarily exist until the police officer corroborated the fact that the individual was in possession of narcotics or other nonthreatening contraband. The officer, without placing his safety or that of others in harms way, would have to wait until the individual exposed the illegal narcotics or other nonthreatening contraband.

police which established that the suspect was engaging in suspicious behavior.

This interpretation has crafted an unrealistic rule which requires a bright line test for constitutionally sanctioned conduct under the Fourth Amendment. This interpretation directly contravenes the rule that "[t]he test of the reasonableness of conduct under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for investigating it and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). Logically and constitutionally, objective facts that establish through an anonymous tip that an individual is carrying a concealed firearm constitutes a sufficiently reliable basis for a *Terry* stop and frisk.

The Florida court's holding has, instead of providing police the ability to diffuse a potentially dangerous situation with a minimal intrusion into a citizen's privacy, turned the situation into a game of "chicken" where the police will have to wait until the firearm is brandished or used and the situation poses a risk of safety to the police or others before reasonable suspicion exists for the detention. In fact, an officer will need the functional equivalent of "probable cause" to arrest for openly carrying a weapon, discharging a firearm in public or the use of the firearm in the commission of a felony. Such a result truly eviscerates a *Terry* stop and frisk.

B. The anonymous tip was sufficiently reliable to justify the investigatory detention and frisk.

The facts of this case clearly establish that the anonymous tip was sufficiently reliable to provide the necessary reasonable suspicion to believe that Respondent was carrying a concealed firearm. The following uncontroverted facts established reasonable suspicion:

1. On October 13, 1995 Officer Anderson, a fourteen year veteran of the Miami-Dade Police Department, was on routine patrol. [A-40].

2. She received a call from her dispatcher regarding an anonymous tip. [A-40].

3. Based on information received from the anonymous tipster, she was then dispatched to the area of 183rd Street and 24th Avenue in Miami. [A-40].

4. The details of the tip were that there were several young black males standing at a bus stand in front of a pawn shop, one of whom was carrying a concealed firearm. [A-40-41].

5. Each young black male was particularly described. [A-40].

6. The individual carrying the firearm was described as a black male with a plaid shirt. [A-40].

7. Officer Anderson and another unit arrived at the bus stop approximately six minutes after receiving the dispatch. [A-41].

8. Officer Anderson saw three black males, who were found at the location where the anonymous informant said they would be, one of whom was wearing a plaid shirt. [A-41].

The exact description of the location and of Respondent and the other two males and the fact that Respondent was carrying a concealed firearm was provided by the anonymous tip. Officer Anderson immediately verified that the three juveniles were at the described location. Upon arriving at scene and observing that the three individuals were juveniles, Officer Anderson knew that, under the law in Florida, Respondent could never be lawfully in possession

of a firearm since: (1) at the time of the offense he was a juvenile;[10] (2) he could not lawfully possess a firearm until he was eighteen;[11] and, (3) he could not get a permit to carry a concealed firearm until he was twenty-one years old.[12] Furthermore, a recent national survey revealed that an estimated 2.6 million American youth, ages 11-18, carried a gun last year.[13] Thus, after the innocent details of the tip was verified, it was statistically more likely that Respondent was in possession of a firearm. Therefore, the reliability of the tip was established and the police officer had reasonable suspicion to believe that Respondent was committing the crime of carrying a concealed firearm. Since reasonable suspicion established the crime of carrying a concealed firearm, an immediate frisk of Respondent was authorized because he was armed and dangerous and posed a threat to Officer Anderson and others. Thus, the seizure of the firearm from Respondent was lawful.[14]

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[10] On page 1 of the state court record, the Petition for Delinquency, the charging document, establishes that at the time of the offense Respondent was ten days shy of his sixteenth birthday.

[11] Fla. Stat. Ch. 790.22(3) (1995).

[12] Fla. Stat. Ch. 790.06(2)(b) (1995).

[13] National Parents' Resource Institute for Drug Education, *12th Annual PRIDE National Survey of Student Drug Use and Violence*, Washington, D.C., September 8, 1999.

[14] The police may, however, seize nonthreatening contraband detected through the sense of touch during such a frisk. *Minnesota v. Dickerson,* 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 34 (1993).

CONCLUSION

Based on the foregoing reasons, the decision of the Supreme Court of Florida should be reversed and the cause remanded to the Florida courts for further proceedings.

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No. 98-1993

IN THE
Supreme Court of the United States

THE STATE OF FLORIDA,
Petitioner,

v.

J. L., a Juvenile,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

RESPONDENT'S BRIEF ON THE MERITS

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36 pp

QUESTION PRESENTED

DOES THE MERE MENTION OF A FIREARM BY AN ANONYMOUS TIPSTER RAISE AN OTHERWISE UNRELIABLE TIP TO THE LEVEL OF REASONABLE SUSPICION?

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STATEMENT OF THE CASE AND FACTS

On October 13, 1995, Miami-Dade Police Officer Carmen Anderson seized and frisked the Respondent, J.L., based on an anonymous tip that a young black man in a "plaid-looking shirt," waiting at a bus stop, had a gun.

Anderson was the sole witness at the hearing on the Respondent's motion to suppress evidence. She testified that she and another officer, whose name she could not recall, were dispatched to the area of 183rd Street and Northwest 24th Avenue in Miami-Dade County, in response to information from an anonymous tipster. (J.A. 40). They arrived about six minutes after the dispatch. The record does not disclose when the tip was received, the identity of the person receiving it, or the length of time that elapsed between the receipt of the tip and the dispatch of Officr Anderson. (J.A. 41).

According to Anderson, the anonymous tipster said that there were "several black males" standing at a bus stop and "that the male with the gun had a plaid-looking shirt and he was a black male." (J.A. 40). The officer said the tipster "gave a description of each one," but she never told the court what that description was, or whether the people she found matched the descriptions given. (J.A. 40-41). The only testimony in this regard was as follows:

> Q. When you arrived on the scene, did you find the persons matching the description?
>
> A. As we approached the bus stop, we saw three black males, one of which was wearing a plaid-looking shirt.
>
> Q. What were the other two boys wearing?
>
> A. I believe one was wearing a tan polo shirt and another color top.

(J.A. 41). The state is inaccurate, then, when it says "Officer Anderson saw three black males . . . each of whom fit the description provided in the tip . . ." Pet. Brief on the Merits at 5, 9, 21. Anderson never said that anyone but J.L. matched the tipster's general description. (J.A. 42).

The tip did not provide details of the suspect's height or hairstyle. It included no approximate age, although Officer Anderson believed the tipster said the black males were "young." (J.A. 41).

When she arrived at the bus stop, Officer Anderson saw "three black males." Among them was J.L., who was wearing a "plaid-looking shirt." (J.A. 41-43). Nobody at the bus stop did anything to arouse Anderson's suspicions. (J.A. 42, 43). Indeed, the officer did not see any of them do anything other than "hang out" at the bus stop. (J.A. 42, 43).

Nevertheless, Officer Anderson accosted all three people, directed them to put their hands up, and began to frisk them. (J.A. 42, 45). As Officer Anderson frisked the Respondent, she saw a gun sticking out of his pocket. (J.A. 42). The officer explained that the gun became visible because the Respondent's shirt did not reach down to where the butt of the gun stuck out of his pocket. (J.A. 42).

The state presented no other evidence. No recording or verbatim transcript of the anonymous tip was introduced. The state offered no testimony concerning the time of day or the nature of the area. The record is also devoid of any evidence concerning the tipster. The state provided no evidence of the underlying facts concerning the tipster's basis of knowledge or motivation for calling. There is no indication in the record to suggest the police attempted to find out any of this information.

At the conclusion of the hearing, the trial court granted the Respondent's motion and ordered the gun suppressed. (J.A. 35). The State of Florida appealed, and the District Court of Appeal reversed, holding that police are entitled to stop and frisk a person whenever they confirm innocent details of an anonymous tip alleging possession of a gun. (J.A. 31-34).

The Supreme Court of Florida reversed, and again ordered the gun suppressed. The court reaffirmed that an anonymous tip, even one that provides only innocent details, can support a stop and frisk. (J.A. 5-8, 11-12). But the court expressly declined the state's "invitation to create a firearms or weapons exception" that would permit a stop and frisk whenever an anonymous tip alleged possession of a gun. (J.A. 1-2, 9-12). On the facts of this case, the court held that the "bare-boned anonymous tip," uncorroborated by independent police work, failed to provide reasonable suspicion justifying the forcible stop and frisk of the Respondent. (J.A. 8, 11).

SUMMARY OF THE ARGUMENT

Officer Anderson had no reason to trust the anonymous tipster when she stopped and frisked the Respondent. The state concedes that the officer's actions would have violated the Fourth Amendment, but for one thing: The mention of a firearm. According to the state, the use of the word "gun" exempted the tipster from the reliability analysis required by this Court's decisions in *Alabama v. White*, 496 U.S. 325, 328 (1990), and *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and permitted the police to act with what would be less than reasonable suspicion in any other case. The issue before this Court is therefore stark: Does the Fourth Amendment requirement of reasonable suspicion based on reliable information disappear whenever an anonymous tipster alleges a gun?

The State of Florida's claim that it does is without support in this Court's stop and frisk jurisprudence. The Court has given police great discretion in the investigation of crime, but it has always required that a forcible seizure be justified either by specific facts known to the police, or reliable outside information. "Some tips, completely lacking in indicia of reliability . . . either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, 407 U.S. 143, 147 (1972). The fact that a tip mentions a gun simply does not demonstrate that the tip is reliable.

The tip in this case surely represents a low-water mark. It provides the bare minimum of information that would allow an officer to distinguish one person from another. The anonymous caller made no predictions, and the police made no effort to gather more information. The tipster did not even allege that a crime was being committed. The state's conclusion that this tip justified a forcible seizure can only be reached by substituting panic for *Terry*'s requirement of a reasoned suspicion based on facts.

To accept the state's position is to declare the Court's reliability requirement—and ultimately *Terry*'s reasonable suspicion standard—dead. It is but a short step from saying that gun possession eliminates the need for reliability to holding that drug possession, or drunken driving, must also be excused from the Fourth Amendment's reliability requirement. Some courts have already done just that. If one accepts the state's argument in this case, it is difficult to think of any anonymous tip that would still be subject to the reliability analysis imposed by this Court's decisions.

Police across the country receive anonymous information every day. When those tips merit further investigation, police have little trouble determining whether or not the tip justifies a stop or arrest. Officers may do this by questioning witnesses, observing suspects, seeking more information from the tipster, or any of a hundred other police techniques. They may not, however, decide to start frisking people whenever the word "gun" is used. To conclude otherwise would be contrary to the Fourth Amendment and the decisions of this Court.

ARGUMENT

THIS COURT MUST REJECT A FIREARMS EXCEPTION THAT WOULD PERMIT FORCIBLE STOPS AND FRISKS BASED ON TIPS "COMPLETELY LACKING IN INDICIA OF RELIABILITY."

The stop and frisk in this case were founded entirely on an anonymous tip and the verification of descriptive details easily observable by "any pilgrim on the roadway." *See Robinson v. State*, 556 So. 2d 450, 452 (Fla. App. 1990), *quoted* at J.A. 5. The State of Florida argues that this case presents the Court with an "opportunity to answer the question left open in *Alabama v. White*." That is, to what degree may police rely on anonymous tips when investigating allegations of gun possession? Pet. Brief on the Merits at 10. This question has already been answered by this Court's decisions. Unreliable, uncorroborated information cannot justify a forcible seizure.

In *Adams v. Williams*, 407 U.S. 143 (1972), police stopped the defendant based on a tip that he possessed both narcotics and a firearm. After analyzing the tipster's reliability (noting that he was known to the officer and had provided information in the past) and observing that the in-person tip would have subjected the informant to

immediate arrest had he lied, the Court concluded, "the information carried enough indicia of reliability to justify the officer's forcible stop of Williams." 407 U.S. at 147. Writing for the Court, Justice Rehnquist explained:

> Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a *credible* informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

407 U.S. at 147 (emphasis added). This Court noted that "[t]his is a stronger case than obtains in the case of an anonymous telephone tip." 407 U.S. at 146.

A bare-bones anonymous tip, by itself, provides no basis to evaluate its reliability. In *Alabama v. White*, 496 U.S. 325 (1990), the Court held that an anonymous tip may become reliable enough to justify a seizure, but only when corroborated by police investigation, or where the content of the tip demonstrates a special familiarity with the suspect. The Court explained:

> The opinion in Gates recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable." *Id.*, [462 U.S.] at 237. This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a Terry stop. But the tip in Gates was not an exception to the general rule, and the anonymous tip in this case is like the one in Gates: "[It] provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding [Vanessa White's] criminal activities." 462 U.S. at 227. By requiring "[s]omething more," as Gates did, *ibid.*, we merely apply what we said in Adams: "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized," 407 U.S. at 147. Simply put, a tip such as this one, standing alone, would not " 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate." Terry, *supra*, 392 U.S. at 22, quoting Carroll v. United States, 267 U.S. 132 (1925).

496 U.S. at 329.

The tip in this case lacks any indicia of reliability. Nothing in the tip showed it to be reliable, and the police lacked the "something more" required under *Illinois v. Gates*, 462 U.S. 213 (1983), and *White*. The tip described only the barest of details (race, gender, "young," location, and a clothing description so vague it did not even include the color of the only garment mentioned). As this Court explained in *White*, "a tip such as this one, standing alone," simply does not justify forcible police action. 496 U.S. at 329.

The State of Florida now asks this Court to adopt a *per se* rule that a bare-bones anonymous tip, standing alone, *does* warrant a person of reasonable caution in the belief that a stop is appropriate—so long as that tip men-

tions a gun. If accepted, the state's position would at best limit *White* to its facts, eliminating the reasonable suspicion standard for virtually all crimes. The state's approach would also relegate this Court's analyis in *Adams v. Williams* to the level of quaint dicta. If the state is right, Justice Rehnquist's careful analysis of the tipster's reliability was simply unnecessary.

The state's position must be rejected. "[A] conscientious assessment of the basis for crediting [anonymous] tips is required by the Fourth Amendment," *Gates*, 462 U.S. at 238, and the mere mention of the word "gun" does not make a tip any more reliable. The proposed rule would reduce the accountability of police and tipsters, encourage false tips, and unnecessarily intrude on citizens' Fourth Amendment rights.

A. The Police May Not Forcibly Seize A Person Without A Reasonable, Individualized Suspicion Based On The Totality Of The Circumstances.

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness is "measured in objective terms by examining the totality of the circumstances," rather than by resorting to "bright-line rules" or "litmus-paper test[s]" *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Under the Fourth Amendment, a reasonable search or seizure is generally one based on probable cause. *See, e.g., United States v. Ventresca*, 380 U.S. 102 (1965). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court carved out a narrow exception to the general rule, allowing police to make an investigatory stop where they reasonably believe the suspect has committed, is committing, or is about to commit a crime. The duration of the stop is limited to that necessary to conduct the investigation; any further detention requires a showing of probable cause.

To justify a *Terry* stop, police must possess specific, articulable facts that would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." 392 U.S. at 22; *see also United States v. Cortez*, 449 U.S. 411, 418-19 (1981) (citations omitted). Reasonable suspicion must be based on more than mere speculation. "Anything less [than particularized suspicion] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulable hunches, a result this Court has consistently refused to sanction." *Terry*, 392 U.S. at 22; *see also Maryland v. Buie*, 494 U.S. 325, 332 (1990).

If the officer reasonably believes the suspect is armed and presently dangerous, and if after the stop the officer's fears are not allayed, he may frisk the suspect for weapons. 392 U.S. at 30. This Court specifically rejected the notion that the frisk is minimally intrusive:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while a citizen stands helplessly, perhaps facing a wall with hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.

392 U.S. at 16-17 (footnotes omitted). Thus, as with a stop, police must be able to point to specific, articulable facts to justify a frisk.

An officer must have reasonable suspicion for a stop "[b]efore he places a hand on the person of a citizen in search of anything." *Sibron v. New York*, 392 U.S. 40, 64 (1968). For this reason, the state's firearms exception to the particularized suspicion requirement for *Terry* stops

can find no support in this Court's protective search cases. The state argues that "a central theme, in developing any Fourth Amendment limitations on protective searches and seizures for weapons, is the protection of police officers and protection of the public in general." Pet. Brief on the Merits at 14. The cases cited by the state do not support its position in this case.

It is true that this Court has approved measures for officer safety, *see, e.g., Maryland v. Buie*, 494 U.S. 325 (1990); *Terry*, 392 U.S. 1 (1969), *but only where the officer has a right to make a forcible seizure.* In each of the cases relied upon by the state, Pet. Brief on the Merits at 14-16, the officer-safety concerns flowed from reasonable suspicion supporting a stop or probable cause for an arrest. *See Maryland v. Wilson*, 519 U.S. 408 (1997) (passenger in car already stopped by virtue of valid traffic stop); *Maryland v. Buie*, 494 U.S. 323 (1990) (arrest on valid warrant); *Michigan v. Long*, 463 U.S. 1032 (1983) (reasonable suspicion for stop *plus* reason to believe suspect dangerous); *New York v. Belton*, 453 U.S. 454 (1981) (probable cause for arrest); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1979) ("In this case, unlike *Terry v. Ohio*, there is no question about the propriety of the initial restrictions on respondent's freedom of movement."); *Chimel v. California*, 395 U.S. 752 (1969) (arrest on valid warrant).

None of these cases support the claim that officer-safety concerns will justify an otherwise impermissible seizure. The constitutional predicate for the frisk lies in the reasonableness of the underlying stop:

> [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. . . . [T]he right to frisk depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Terry, 392 U.S. at 32-33 (Harlan, J., concurring). The officer's privilege to make a frisk or protective sweep flows from the authority to make a seizure. "Officer safety" does not itself justify a stop for the purpose of making a search. Here, the police had no right to frisk because neither the tip nor the officer's observations provided reasonable suspicion justifying a forcible stop.

This Court has consistently declined to substitute a bright-line test for a case-by-case determination of the reasonableness of police action. *See, e.g., Robinette*, 519 U.S. 33, 39-40; *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990); *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988); *Florida v. Royer*, 460 U.S. 491, 506 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 92-95 (1979); *see also Illinois v. Wardlow*, —— U.S. ——, 2000 WL 16325 (Jan. 12, 2000) (Stevens, J., concurring in part, dissenting in part).

In this case, the police observed no illegal or suspicious behavior; they saw only three young men standing at a bus stop.[1] *See Reid v. Georgia*, 448 U.S. 438, 441 (1980) (distinguishing between suspicious conduct and circumstances typical of a "very large category of presumably innocent travelers"). The basis for their forcible stop and frisk was solely the anonymous phone tip. As set forth below, the tip is plainly unreliable and therefore failed to establish reasonable suspicion.

Recognizing this failing, the state petitions for a firearms exception to the constitutional standard of reasonable suspicion. This proposed exception ineluctably lowers

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[1] The conduct here is thus patently distinguishable from that in *Ilinois v. Wardlow*, —— U.S. ——, 2000 WL 16325 (Jan. 12, 2000).

that standard below a bare suspicion or hunch. The mere mention of a gun does not create reasonable suspicion where it is otherwise lacking under this Court's decisions. The state's position is a radical departure from this Court's jurisprudence.

B. An Anonymous Telephone Tip Cannot Justify A Forcible Seizure Unless It Is Shown To Be Reliable.

This Court has always viewed an anonymous telephone tip with mistrust. *See Adams v. Williams*, 407 U.S. at 146-47. However, as the Supreme Court of Florida recognized below, a *Terry* stop may be made on the basis of an anonymous tip, provided the tip is sufficiently corroborated by independent police work giving rise to the reasonable belief that the tip is correct.

In *Alabama v. White*, the Court explained that there are two factors in determining the reliability of an anonymous tip: 1) the tipster's relationship either to the suspect or the alleged crime and 2) the nature of the information contained in the tip.[2] 496 U.S. at 330.

Where the anonymous tipster possesses a special relationship with the suspect or the crime enabling him to know relevant, intimate details, police may rely on the trustworthiness of the tip. *Illinois v. Gates*, 462 U.S. at 237. That reliance is justified, for example, where the

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[2] In *Adams v. Williams*, the Court qualified its approval of informant tips to initiate stops and frisks by noting that 1) the informant was personally known to the officer and had provided reliable information in the past; 2) the officer was alone late at night in a high-crime area; and 3) the informant could be punished under Connecticut law for giving a false police report.

See also Aguilar v. Texas, 378 U.S. 108 (1964) (testing the reliability of informant's tip for purposes of arrest or issuance of search warrant) *abrogated by Gates*, 462 U.S. at 238; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(h) at 215 (3d ed. 1996).

tipster is a victim of, or an eyewitness to, a crime.[3] "Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion." *Alabama v. White*, 496 U.S. at 330.

The second factor concerns the nature of the information contained in the anonymous tip. Does the tip provide sufficient details to enable the officer to readily corroborate it? If the tip contains only general details of identification (such as gender, race, clothing or location), it fails to show a particularized knowledge of the alleged criminality and is therefore unreliable without additional police investigation. *See Alabama v. White*, 496 U.S. at 332; *Illinois v. Gates*, 462 U.S. at 245; *see also United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996); *United States v. McLeroy*, 584 F.2d 746 (5th Cir. 1978); *cf. United States v. Kent*, 691 F.2d 1376 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).[4]

Here, the tip provided no indication of a relationship between the tipster and the Respondent or why the tipster claimed there was a gun. In short, the tip provided no legitimizing context whatsoever, and thus it failed to indicate whether it was based on personal observation or mere speculation.

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[3] Similarly, although not the case here, if the tipster is known to police and has provided reliable information in the past, an added degree of reliability exists. *See Adams v. Williams*, 407 U.S. 143 (1972); *Draper v. United States*, 358 U.S. 307 (1959).

[4] One police officer estimated that 90% of the anonymous tips received in New York proved to be unfounded. *See* Vera Institute of Justice report entitled "Felony Arrests: Their Prosecution and Disposition in New York Courts, xi-xii (1977), cited in *People v. McLaurin*, 43 N.Y.2d 902, 904, 374 N.E.2d 614, 615, 403 N.Y.S.2d 720, 721 (1978) (Fuchsberg, J., dissenting).

In *Alabama v. White*, the Court rejected the idea that a tip could be considered reliable simply because it provided " 'easily obtained facts and conditions existing at the time of the tip.' " 496 U.S. at 332, *quoting Gates*, 462 U.S. at 245. Instead, the Court emphasized that the tip contained information (accurate predictions of future behavior) that "the general public would have no way of knowing" and that "demonstrated inside information—a special familiarity with [White]'s affairs." 496 U.S. at 332. Even with this information, the Court termed *White* a "close case." 496 U.S. at 332.

The tip in this case supplied police with only a general number ("several"), relative age ("young"),[5] race,[6] gender, clothing ("plaid-looking shirt"), and location. These facts are easily obtainable by someone lacking special knowledge or intimacy with the suspects or crime. To accept as sufficient the mere corroboration of these innocuous, publicly observable facts, is to nullify the reasonable suspicion requirement. *See Alabama v. White*, 496 U.S. at 333 (Stevens, J., dissenting).

As the Supreme Court of Pennsylvania observed in *Commonwealth v. Hawkins*, 547 Pa. 652, 656, 692 A.2d 1068, 1070 (1997):

> If the police respond to an anonymous call that a particular person at a specified location is engaged in criminal activity, and upon arriving at the location see a person matching the description but nothing more, they have no certain knowledge except that the caller accurately described someone at a particular location. As the United States Supreme Court observed in Illinois v. Gates, the fact that a suspect resembles the anonymous caller's description does not corroborate allegations of criminal conduct, for anyone can describe a person who is standing in a particular location at the time of the anonymous call. Something more is needed to corroborate the caller's allegations of criminal conduct. *The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before.*

(Emphasis added.)

The mere conclusion by an unknown tipster that an individual is carrying a gun, without any corroboration, "is but a bald and unilluminating assertion of suspicion that is entitled to no weight." *Spinelli v. United States*, 393 U.S. 410, 414 (1969) (concerning inadequacy of affiant's allegation that Spinelli was a known "gambler") *abrogated by Gates*, 462 U.S. at 238. *See also* Comment, *Police Power to Stop and Frisk*, 86 HARV. L. REV. 171, 181 n.35 (1972).

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[5] Contrary to the state's representations, *see* Pet. Brief on the Merits at 21, there was no evidence that the officer knew that the Respondent was a juvenile. The only evidence in the trial court was Officer Anderson's testimony that she "believed" the tipster "stated they were young." (A-41).

[6] It is significant to note the frequency with which suspects named by anonymous tipsters are African-American or Hispanic, a concern discussed by Brief of Congress of Racial Equality as Amicus Curiae on behalf of the Respondent.

Indeed, a recent report prepared by the Civil Rights Division of the New York Attorney General's Office concluded that "blacks were over six times more likely to be 'stopped' than whites in New York City, while Hispanics were over four times more likely to be 'stopped' than whites in New York City." New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General at 95 (1999) <http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf> ; *see also* Carol Steiker, *Second Thought About First Principles*, 107 HARV. L. REV. 820, 844 (1994) (noting pre- and post-Terry cases demonstrating racial considerations).

A majority of the caes cited by the state in support of a firearms exception involved anonymous tips of African-American males.

The ability to predict future behavior is one of the most significant legitimizing features of a tip. If the tip predicts future behavior or events, those predictions can be easily corroborated by police and the tip gains reliability.[7] This is particularly important in the case of an anonymous tipster. *Alabama v. White*, 496 U.S. at 332; *see also Illinois v. Gates*, 462 U.S. at 245; *United States v. Kent*, 696 F.2d 1376, 1379; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(h) at 214. Again, the anonymous tip in this case relayed no predictive information whatsoever.

A police officer's hunch will not justify a *Terry* stop, even though the officer presumably acts with the best of intentions. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Sibron v. New York*, 392 U.S. 40, 64 (1968). There is no way of knowing whether an anonymous telephone tip is based on a hunch, hearsay, or speculation. *See Alabama v. White*, 496 U.S. at 329 (tipsters "generally do not provide extensive recitations of the basis of their everyday observations"); *Gates*, 462 U.S. at 237. Nor will a tip establish whether the tipster is motivated by anything other than malice. *See, e.g., White*, 496 U.S. at 333 (Stevens, J., dissenting). It is difficult to understand, then, why this Court should adopt a rule that will treat anonymous tips as presumptively *more* reliable than the hunches of experienced police officers. Under the state's approach, Officer Anderson could not have stopped the Respondent at the direction of a fellow officer who had a good-faith hunch, *see United States v. Hensley*, 469 U.S. 221 (1985),[8] but she could act on the word of an

[7] *See, e.g., Draper v. United States*, 358 U.S. 307 (1959).

[8] In *Hensley*, the Court concluded that a police officer could make a *Terry* stop based on a bulletin from another department, so long as the bulletin was originally "issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense." 469 U.S. at 232.

unknown prankster. If this Court adopts the proposed firearms exception, an officer who suspects a person of possessing a firearm would be well advised to simply call in an anonymous tip and avoid scrutiny of the basis for her suspicions.[9]

C. The Allegation That A Person Is Carrying A Firearm Does Not Justify An Exception To The Rule Of *Terry v. Ohio* And *Alabama v. White*.

The state seeks an exception to *White* whenever 1) the anonymous tipster alleges that the suspect is carrying a firearm and 2) the police verify publicly observable descriptive details. In support of its position, it offers twenty state and federal cases that purportedly represent the "majority view."[10] *See* Pet. for Writ of Cert. at 9.

These cases do not carry the weight assigned to them by the state. One of the cases is a drug case, and the reference to anonymous tips and firearms appears only in dicta.[11] Most of the remaining cases involve circumstances or factors that provide objective, independent proof of the reliability and accuracy of the tip:

[9] Police fabrication has been cited as a major problem in New York, Los Angeles, Atlanta, New Orleans, Detroit, Minneapolis and Philadelphia. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Joe Metcalfe, Recent Development, *Anonymous Tips, Investigatory Stops and Inarticulate Hunches—Alabama v. White*, 110 S.Ct. 2412, 26 HARV. C.R.-C.L. L. REV. 219 (1991).

[10] *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992); *cert. denied*, 506 U.S. 1070 (1993) and *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981) are representative of the firearms exception pressed by the state.

[11] *See United States v. Roberson*, 90 F.3d 75, at 81 n.4 (3d Cir. 1996).

- The subjects made furtive movements upon the approach of the police.[12]
- The informants, through face-to-face encounters with police, related their personal observations of the subjects' gun possession.[13]
- The officer knew the subject was known to carry a gun and had been in trouble before.[14]
- The car from which a gun was seized was stationed in an unusual position in a parking lot coupled with its darkly tinted windows.[15]
- Dispatcher records at a hearing confirmed police had received two calls from two separate citizen informants indicating eyewitness observation of the subject's gun possession.[16]

A review of these decisions demonstrates that they would be precisely the same under a correct application of the "totality of circumstances" approach. Contrary to the state's claim, *see* Pet. for Writ of Cert. at 9, the de-

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12 *See United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995) (while turning to face police, subject reached behind his back with both hands); *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996) (subject took several steps backward, turned slightly to side and moved his hands as if he might be about to draw a gun); *People v. Smithers*, 83 Ill. 2d 430, 415 N.E.2d 327, 47 Ill. Dec. 322 (1980) (subject suddenly reversed direction and walked toward tavern's rear exist); *State v. Sharpless*, 314 N.J. Super. 440, 715 A.2d 333 (subject took his right hand out of his pocket and started to walk away), *cert. denied*, 157 N.J. 542, 724 A.2d 802 (1998).

13 *See Johnson v. State*, 50 Md. App. 584, 439 A.2d 607 (1982) and *State v. Franklin*, 41 Wash. App. 409, 704 P.2d 666 (1985) (known informant).

14 *See State v. Hasenbank*, 425 A.2d 1330 (Me. 1981).

15 *See United States v. Bold*, 19 F.3d 99 (2nd Cir. 1994).

16 *See State v. Williams*, 251 N.J. Super. 617, 598 A.2d 1258 (1991).

cisional law of New Jersey, New York, and Hawaii does not endorse a firearms exception.

In *State v. Goree*, —— A.2d ——, 2000 WL 19771 (N.J. Super. Ct. App. Div. Jan. 13, 2000), the anonymous tip related that a black male in a green and purple jeep possessed a gun at a specified location in a drug area. The police located a jeep matching the description one block away, and found the defendant (a black man whom the officer had previously seen driving the jeep) in a bar on the same street. Citing the Supreme Court of Florida's decision in *J.L.*, the New Jersey appellate court explicitly rejected a firearms exception to *Terry*:

> The informant in Adams v. Williams, told the officer "that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist, early in the morning in a high-crime area of Bridgeport, Connecticut." And the commentators seem to agree that Adams v. Williams was about the closest case of this type in which the government could prevail. See discussion 4 LaFave, Search and Seizure, § 9.4 (h) at 213, 230 (3rd ed. 1996) . . . In Alabama v. White, also termed a "close call" by Justice White, the tipster predicted certain "future behavior" by the suspect which police corroborated, to an extent, independently of the tipster. We have nothing like that predictive corroboration in the case before us.
>
> * * *
>
> *We decline to embrace a "man with a gun exception" to the rule of individualized reasonable suspicion to "stop and frisk." As Justice White said in Alabama v. White: "Simply put, a[n] [uncorroborated anonymous] tip such as this one, standing alone, would not warrant a man of reasonable caution in the belief that a stop was appropriate . . ."*

State v. Goree, 2000 WL 19771 (citations omitted) (emphasis added).

Likewise, New York courts have repeatedly rejected a firearms exception to the reasonable suspicion standard. *See People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (anonymous tip that black man with red shirt possessed gun insufficient); *People v. Stephens*, 139 A.D.2d 412, 526 N.Y.S.2d 467 (1988); *People v. Bond*, 116 A.D.2d 28, 499 N.Y.S.2d 724 (1986). In *People v. Gray*, 154 A.D.2d 301, 546 N.Y.S.2d 844 (N.Y.A.D. 1 Dept. 1989), the court observed:

> It is well established that an anonymous tip which provides a general description and specifies a location of a "man with a gun" does not, without more, constitute a reasonable suspicion to stop and frisk anyone who may happen to meet the description. *Such tips "are of the weakest sort since no one can be held accountable if the information is in fact false . . . and there is no way to assure . . . that the information was communicated and received accurately and was believable."* For this reason, information anonymously conveyed will generally warrant no more than the exercise of common-law right of inquiry.

154 A.D.2d at 302, 546 N.Y.S.2d at 846 (citations omitted) (emphasis added).

In *State v. Temple*, 65 Haw. 261, 650 P.2d 1358 (1982), the Supreme Court of Hawaii held that police were not authorized to stop and search a particular car based upon an anonymous informant's telephone tip that she had seen a handgun in the same car's glove compartment that day. The Court concluded that the anonymous telephone call "failed to rise above the level of unsubstantiated and conclusory hearsay." 65 Haw. at 271, 650 P.2d at 1364.

The Supreme Judicial Court of Massachusetts likewise rejected a firearms exception in *Commonwealth v. Alvarado*, 423 Mass. 266, 667 N.E.2d 856 (1996). The anonymous telephone caller there had reported seeing a handgun wrapped in a towel inside a car, and related seeing the car at a specific location with several Hispanic subjects inside. The police verified only the tip's innocuous details. Invalidating the stop, the Massachusetts supreme court held:

> . . . we are reluctant to relax our established rule that the report of the carrying of a firearm is not, standing alone, a basis for having a reasonable suspicion of criminal activity.
>
> * * *
>
> "Anyone can telephone the police for any reason. Thus, some specificity of nonobvious facts which show familiarity with the suspect or specific facts which predict behavior is central to reasonable suspicion. By using objective criteria, the risk of arbitrary action and abusive practices by police is diminished."
>
> * * *
>
> Our cases have not yet declared reasonable suspicion warranted simply on a report of gun possession just because this country has problems with the unlawful use of guns.

Alvarado, 423 Mass. at 271, 272, 273, 667 N.E.2d at 860, 861 (citations omitted).

In *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997), the police received an anonymous telephone tip that a man in a green jacket was carrying a gun at a certain location, and the only detail the police corroborated was that Jackson was at the described location in a green jacket. The Supreme Court of Pennsylvania held that the details of the tip combined with the police

corroboration of it failed to satisfy the reasonable suspicion standard. The court refused to endorse a gun exception to the *Terry* requirement for reasonable suspicion.

> The Commonwealth contends, however, that the degree of danger to the police and the public from armed criminals is so great that if an anonymous caller provides a physical description of the individual, an accurate location and an allegation that the individual is armed, a Terry stop is justified. That argument will not withstand constitutional scrutiny. *The danger to the police and public from firearms was already factored into the balance when the requirement of reasonable suspicion was articulated in Terry. To adopt the position that the Commonwealth urges is in reality to overrule Terry in favor of a lower standard of protection under the state and federal constitutions . . .*

548 Pa. at 492, 698 A.2d at 575 (footnote omitted). *Accord, Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997).

Far from taking a radical position, Florida stands in good company in rejecting the firearms exception to the reasonable suspicion standard, and finds support in jurisdictions around the country.

D. The State's Proposal Would Make *Alabama v. White* The Exception, Rather Than The Rule.

The firearms exception proposed by the state would swallow this Court's search and seizure jurisprudence. The state readily admits that "the general rule" (that is, the one established by this Court's precedents) would not permit a forcible seizure where publicly observable details of a description are "corroborated." But, the state claims, the "great risk of harm to the public" posed by the alleged possession of a firearm takes gun tips outside

the "general rule." *See* Pet. Brief on the Merits at 11-12. If applied here, the state's approach, substituting "great risk of harm to the public" for reliability whenever a gun is mentioned, will predictably be used to legitimate anonymous tips about nearly all potentially criminal conduct. Several courts have already applied the firearms exception reasoning to anonymous tips involving drug sales and drunken driving. *See, e.g., State v. Williams*, 225 Wis. 2d 159, 591 N.W.2d 823 (1999), and *State v. Lamb*, 720 A.2d 1101 (Vt. 1998), discussed below. Ultimately, the state's approach would legitimize searches and seizures based on any bare-boned tip alleging potentially dangerous circumstances.

A firearms exception would necessarily extend to anonymous tips alleging robbery. In *Terry*, this Court held that it was reasonable for an officer to assume robbery suspects were armed. 392 U.S. 28; *see also Russell v. State*, 415 So. 2d 797 (Fla. App. 1982) (stop for suspicion of robbery justified frisk, even though based on report of *strong-arm* robbery); *United States* ex rel. *Richardson v. Rundle*, 461 F.2d 860, 863-64 (3d Cir. 1972) ("Unless one were to believe that Philadelphia robbers usually accomplished their ends by blandishment rather than by the use of weapons one must conclude that the officer could reasonably infer petitioner might be armed."). Under the firearms exception then, a bare-bones anonymous tip alleging that a man in a plaid-looking shirt at a particular location was about to commit a robbery would justify a forcible stop and frisk upon confirmation of the innocent description.

This same reasoning has been applied to stops and frisks for allegations of burglary, *see United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989), rape, *see People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976), and even credit card fraud, *see United States*

v. Edwards, 53 F.3d 616 (3d Cir. 1995). Presumably, tips concerning these crimes would also fall under the "firearms exception."

Even drug cases would be encompassed by the proposed "gun" exception. The state suggests that the tip in this case would be insufficient only if it related to "possession of narcotics or other nonthreatening contraband." *See* Pet. Brief on the Merits at 18 n.9. But courts have held that police may presume armed those they suspect of drug crimes. *See United States v. Sinclair*, 983 F.2d 598 (4th Cir. 1993); *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991) (frisk permitted because police "know narcotics dealers frequently carry weapons"); *Abraham v. State*, 962 P.2d 647 (Okl. Crim. App. 1998) (police could conclude suspect was armed because "the offense reported was an offer to sell drugs"). The state's proposed exception to *Alabama v. White* would surely swallow the rule.[17]

The rationale offered for the firearms exception would apply to most serious felonies, even without the assumption that people involved in certain crimes are likely to

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[17] The "seize first, ask questions later" approach advocated by the state has a direct impact on the lives of innocent Americans. In a recent report, the New York Attorney General cites the example of Jean Davis, a 54-year-old African-American health-care worker. As she walked home one night, a man approached her from behind and grabbed her around the neck. When Ms. Davis screamed for help, her attacker informed her he was a police officer. He dragged her to a car and frisked her. Later, the officer explained that the police had received a call that someone had purchased drugs in the area. He had seized her because she fit the general description of the alleged purchaser. The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, 78-79 (1999) <http://www.oag.state.ny.us/press/reports/stop—frisk/stp—frsk.pdf>.

be armed. If a firearm tip poses such "great risk of harm to the public" that this Court's opinion in *Alabama v. White* should not apply, then why not tips involving other serious crimes? Surely, an anonymous tip that someone is about to commit a robbery, a burglary, or an aggravated assault involves at least as great a risk of harm to the public as one alleging the mere peaceful possession of a firearm. Just as surely, it will not be long before the state argues that a "firearms exception" implies a general "dangerous crime" exception.

There is no need to speculate on the mischief the proposed firearms exception would work. Courts have already relied on gun-exception cases like *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992) and *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981) to justify stops based on anonymous tips regarding drug-dealing and drunken driving, even where only innocent details of description were corroborated. In *State v. Williams*, 225 Wis. 2d 159, 591 N.W.2d 823 (1999), the Supreme Court of Wisconsin approved a stop and frisk based on an anonymous tip alleging that a man in a car was selling drugs. The police conducted no independent investigation. Instead, with weapons drawn, the officers ordered two men out of the car and frisked them for weapons. 225 Wis. 2d at 165-66; 591 N.W.2d at 826-27. The court reasoned that the officers faced the same "unappealing choice" presented by gun tips. 225 Wis. 2d at 179, 591 N.W.2d at 832. In response to the defendant's argument that cases like *Clipper*, relied upon by the court, had involved firearms tips, not drugs, the court explained:

> The distinction is one of degree only. Drug dealing is a dangerous activity, and we have previously recognized that where drugs are involved, guns are

> probably involved as well. It is unreasonable to conclude that drug dealing poses no danger to the community—it is not a non-violent crime—and when deciding whether to make a stop, the possible danger the subject of a tip poses to the community is necessarily one of an officer's considerations.

225 Wis. 2d at 180, 591 N.W.2d at 832 (citation omitted).

Other courts have taken precisely the same approach in approving drunken-driver stops based on uncorroborated anonymous tips. For instance, in *State v. Lamb*, 720 A.2d 1101 (Vt. 1998), the Supreme Court of Vermont distinguished *Alabama v. White*, saying:

> [T]he circumstances here created an element of urgency that was not present in White. The reported offense in White, possession of an ounce of cocaine, posed no imminent threat of harm to the suspect or to the general public requiring an immediate police response. The alleged offense here, driving while intoxicated, presented a substantial and immediate risk of death or serious injury to both the driver and anyone unlucky enough to get in his way.

720 A.2d at 1104. Citing *Clipper* and *McClinnhan*, the court concluded: "The principle of these deadly-weapons cases—that the gravity of the risk of harm must be considered in evaluating the reasonableness of the investigatory stop—applies with equal force to intoxicated driving." 720 A.2d at 1105; *accord State v. Littlefield*, 677 A.2d 1055 (Me. 1996); *State v. Tucker*, 19 Kan. App. 2d 920, 878 P.2d 855 (1994); *State v. Markus*, 478 N.W2.d 405 (Iowa Ct. App. 1991).

These cases demonstrate that the alleged possession of a firearm does not create an emergency that would warrant a departure from the "general rule." Gun tips, like

most tips the police investigate, may involve crime, and the investigation of crime is of course a serious matter. It was with this in mind that the Court decided *Terry*, *Adams v. Williams*, and *Alabama v. White*. The firearms exception urged by the state is unworkable, and will inevitably yield the "firearm-drugs-felony-DUI-serious crime" exception to the Fourth Amendment.

The proposed firearms exception would also allow stops without the necessity of an allegation of illegal conduct. The state would permit *Terry* stops based on tips like the one in this case, so long as the tipster "states that a person is carrying a concealed firearm." Pet. Brief on the Merits at 10. Florida, like many states, allows residents to carry concealed firearms with a proper license. *See* § 790.06, (Fla. Stat. 1997), cited in the opinion on review at J.A. 11.[18] Moreover, as noted by the decision below, Florida law permits juveniles to possess firearms under certain circumstances. *See* § 790.22, Fla. Stat. (1997).

The state offers no reason why the police should be entitled to assume that all those who carry firearms do so illegally. Yet, far from being troubled by the thought that a *Terry* stop would be justified by suspicion of *legal* behavior, the state actually argues that the firearms exception is *justified* by the fact that concealed firearms possession is legal in 42 states and the District of Columbia. *See* Pet. Brief on the Merits at 17-18.

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[18] Though the Respondent was under 18 and, therefore, had a more limited right to carry firearms, nothing in the record suggests that Officer Anderson was aware of his minority before the seizure. When asked if the tipster said the "young black males" were juveniles, Anderson merely replied "I believe they stated they were young." (J.A. 41). The State's suggestion that Officer Anderson knew the Respondent to be under 18 is not supported by the record. *See* Pet. Brief on the Merits at 21.

E. This Court Has Never Recognized An Exception To The Reasonable Suspicion Standard Absent A Showing Of Actual And Immediate Danger.

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), this Court held that absent evidence of an actual danger to police or others, police may not use a general search warrant to justify the search of people present at the crime scene. Based on allegations related by a known, proven-reliable informant, Illinois Bureau of Investigations agents obtained a search warrant authorizing the search of a particular tavern and bartender for heroin. Once inside the tavern, agents twice frisked Ybarra, a patron standing by a pinball machine near the bar. On the second frisk, they removed from his pants pocket a cigarette pack containing heroin. 444 U.S. at 88-89.

The Court held that the frisk violated the Fourth Amendment. Ybarra had not made any furtive or threatening movements and the agents had no reason to suspect him of criminality or an inclination to assault them. 444 U.S. at 91-94. Thus, there was no showing of dangerousness to justify the frisk.

Ybarra demonstrates that in order to justify a police frisk, the officer must reasonably believe the suspect presents an actual and immediate danger. This Court has repeatedly rejected the government's efforts to substitute the presumption of danger for an actual and immediate one.

Similar concerns arise when police respond to emergencies; here, as in *Ybarra*, immediacy of the danger is the cornerstone of the emergency doctrine. *See also* Edward G. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419 (1972).

CONCLUSION

When the Court first defined what has come to be called the reasonable suspicion standard, it observed:

> Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, 392 U.S. at 22. Since then, the Court has held that a tip like the one in this case simply does not provide a reasonable suspicion. *See Alabama v. White; Adams v. Williams.* The State of Florida now asks the Court to permit forcible seizures based on "something less" when gun possession is alleged. The answer to the state's claim was given in *White*, and in *Terry* before it: It is a result this Court must refuse to sanction.

The judgment of the Supreme Court of Florida must be affirmed.

Respectfully submitted,

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CASE NO. 98-1993
IN THE UNITED STATES SUPREME COURT
October Term 1999

THE STATE OF FLORIDA,
Petitioner,

vs.

J.L., a juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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A. A *Terry* stop and frisk is justified by the totality of the circumstances, where an anonymous tip relates both innocent facts, verified immediately, and the carrying of a concealed firearm.

B. The anonymous tip was sufficiently reliable to justify the investigatory detention and frisk.

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ARGUMENT

AN ANONYMOUS TIP WHICH STATES THAT A PERSON IS CARRYING A CONCEALED FIREARM AT A SPECIFIC LOCATION, WITH A DETAILED DESCRIPTION OF THE PERSON AND HIS ATTIRE, IS SUFFICIENTLY RELIABLE TO JUSTIFY AN INVESTIGATORY DETENTION AND FRISK WHERE THE POLICE IMMEDIATELY VERIFY THE ACCURACY OF THE TIP.

A. A *Terry* stop and frisk is justified by the totality of the circumstances, where an anonymous tip relates both innocent facts, verified immediately, and the carrying of a concealed firearm.

Florida's position, as clearly stated in its initial brief, is that the Fourth Amendment does not totally proscribe a *Terry*[1] stop and frisk based on an anonymous tip that an individual is carrying a concealed firearm where only the innocent details of the tip are immediately verified. Such a stop and frisk is lawful if, based on the totality of the circumstances, reasonable articulable suspicion exists that the individual is carrying a concealed firearm. The existence of reasonable suspicion is established based on the quantity and quality of the verified innocent details, including the age of the individual who is alleged to be carrying a concealed firearm.

The Respondent, in its answer brief, totally misconstrues Florida's position. According to Respondent, Florida's position is that whenever an anonymous innocent details tip states that a firearm is involved, reasonable suspicion always exists to support a *Terry* stop and frisk. After erecting the strawman "firearm exception" position,

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[1] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Respondent then advocates for a bright line rule that reasonable suspicion can never be established by an anonymous tip that an individual is carrying a concealed firearm where only the innocent details are verified.

Florida's position is in accord with the Court's Fourth Amendment jurisprudence that holds that bright line rules are antithetical to the concept of reasonable suspicion. *See Illinois v. Wardlow*, 120 S.Ct. 673 (2000). In *Wardlow*, Illinois asked the Court to announce a bright line rule authorizing the temporary detention of anyone who flees at the mere sight of a police officer. Wardlow, on the other hand, asked the Court to adopt the opposite per se rule that the fact that an individual flees upon seeing the police can never, by itself, be sufficient to justify a *Terry* stop. The Court rejected both positions and held the flight from a police officer is just one circumstance in the totality of circumstances that determines the existence of reasonable suspicion. The Court then held that neither presence in a high crime area standing alone and nor flight from a police officer standing alone establishes reasonable suspicion. However when these two circumstances are present at the same time reasonable suspicion is established.

Florida urges that reasonable suspicion is established based on the quantity and quality of the verified innocent details of an anonymous tip that an individual is carrying a concealed firearm. Therefore, the Court should quash the Supreme Court of Florida's holding that such a tip can never provide the necessary reasonable suspicion to justify a *Terry* stop as a misapprehension of the law.

B. The anonymous tip was sufficiently reliable to justify the investigatory detention and frisk.

The totality of the circumstances herein establishes the requisite reasonable suspicion. The anonymous tip stated that three black youths were standing at a bus stop in front of a pawn shop. The three youths were described with particularity. Within six minutes of receiving the tip, Officer Anderson verified the tip's innocent details. After the innocent details of the anonymous tip were verified, Officer

Anderson's commonsense judgments and inferences about human behavior established reasonable suspicion. *See Illinois v Wardlow*, 120 S.Ct. 673, 676 (2000).

The instant situation is exactly what the Court envisioned in *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). After discovering sets of distinctive human footprints in the desert, Border Patrol officers deduced that on a number of occasions groups of from 8 to 20 persons had been guided by a person, whom they designated "Chevron," from Mexico across an area of desert in Arizona, known to be heavily trafficked by aliens illegally entering the country. These groups of aliens proceeded to an isolated point on a road to be picked up by a vehicle; the officers deduced the vehicle probably approached from the east and returned to the east after the pickup. They also surmised, based on the times when the distinctive tracks were discovered, that "Chevron" generally traveled on clear nights during or near weekends, and arrived at the pickup point between 2 a. m. and 6 a. m. On the basis of this information, the officers stationed themselves at a point east of the probable pickup point on a night when they believed there was a strong possibility that "Chevron" would be smuggling aliens. The officers observed a pickup truck with a camper shell suitable for carrying sizable groups pass them heading west and then observed the same vehicle return within the estimated time for making a round trip to the pickup point. The officers stopped the vehicle, which was being driven by respondent Cortez and in which respondent Hernandez-Loera, who was wearing shoes with soles matching the distinctive "chevron" shoeprint, was a passenger. Cortez voluntarily opened the door of the camper and the officers then discovered illegal aliens. The Court in finding that reasonable suspicion existed discussed the principles underlying the determination.

> It implicates all of the principles just discussed--especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion. We see here the kind

> of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement. Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officer to focus on "Chevron."

Id. at 419, 101 S.Ct. at 695-969.

Common sense judgment established that the individuals described by the tip as youths were, in fact, juveniles. In this situation the term youths means the time of life between childhood and maturity.[2] Therefore, upon Officer Anderson's arrival on the scene, her observation verified that the youths were juveniles.

Once Officer Anderson verified that the individuals were juveniles, the inference was established that in Florida it was more likely than not that the juvenile possessed a firearm. The Florida Legislature, when it enacted strict and harsh legislation regulating juveniles and their possession and use of firearms in Fla. Stat. Ch. 790.22 (1994 Supp.), acknowledged this fact in the legislative intent.[3]

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[2] "Youths" means: "4. the period of life from puberty to the attainment of full growth; adolescence." Random House Unabridged Dictionary; 2205 (1993 Ed.).

[3] 1993 Fla. Laws Ch. 416 states:

WHEREAS, the love affair between juveniles and firearms has reached an all-time high here in Florida, and

WHEREAS, the courts, the Legislature, and law enforcement cannot be the sole solution to stem our rising juvenile crime statistics, and

WHEREAS, it is the will of the Legislature and all Floridians that parental involvement, accountability, and responsibility become key to solving our existing broken criminal justice system, and

WHEREAS, it is the will of Floridians all across this great state of ours that juveniles who violate laws pertaining to the illegal use of firearms be dealt with in a swift and certain manner, and

WHEREAS, it is time for the Governor, the President of the Senate, and the Speaker of the House of Representatives, along with the republican leaders of the Senate and House of Representatives, to seek relief from our

Since empirical studies dealing with how many Florida juveniles carry concealed firearms do not exist, they can not be utilized in determining the propriety of Officer Anderson's conduct. Rather based on the facts and the inferences drawn therefrom, the propriety of Officer Anderson's conduct and thus the determination of reasonable suspicion herein must be based on commonsense judgments about human behavior. Officer Anderson's determination that reasonable suspicion existed to stop and frisk Respondent requires the Court's approval, since after she verified that the particularly described youths were at the particularly described location, she utilized her commonsense judgment that in Florida it was more likely than not that the Respondent was carrying a concealed firearm in effectuating the stop. Officer Anderson's use of commonsense judgment in ferreting out crime has an important place in the reasonable suspicion equation. Thus, its consideration herein, along with the objective facts as established by the innocent detail tip, establishes the necessary reasonable suspicion to support the instant stop and frisk.

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counterparts in the United States Congress by cutting the federally mandated ties that bind us from curing our juvenile crime problems here at home, as said laws prevent us from using stricter, harsher, and more certain penalties in detaining Florida's juveniles,...

CONCLUSION

Based on the foregoing reasons, the decision of the Supreme Court of Florida should be reversed and the cause remanded to the Florida courts for further proceedings.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF FLORIDA

v.

J.L.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether police officers may possess reasonable suspicion for a stop and frisk when they receive an anonymous tip that a person of a particular description, at a particular location, is illegally carrying a concealed firearm, and the officers promptly verify the observable details provided by the tip.

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INTEREST OF THE UNITED STATES

This case presents a recurring question of whether police officers may respond to an anonymous tip that a particular person is illegally carrying a concealed firearm by verifying observable details of the tip, and then conducting an investigative stop and frisk. Because that question arises in prosecutions conducted by the United States, the United States has a substantial interest in its resolution.

STATEMENT

1. Florida police received an anonymous tip that several young black males were standing at a bus stop in front of a pawn shop near 183d Street and Northwest 24th Avenue, Miami, Florida, and that one of them was carrying a gun. The anonymous caller gave a descrip-

tion of each person, and said that the person carrying the gun had a plaid-looking shirt. Officer Carmen Anderson and another officer were dispatched to the location specified in the tip and arrived there within approximately six minutes. When Officer Anderson arrived, she saw three young black males standing at the bus stop in front of the pawn shop; one of the three was wearing a plaid shirt. Anderson immediately approached the person wearing the plaid shirt (respondent) and asked him to put his hands up on the bus stop. As she began to frisk respondent, Officer Anderson noticed the butt of a gun protruding from his left pocket. Anderson then removed the gun from respondent's pocket. Pet. App. A39-A43. While officer Anderson frisked respondent, the other officer frisked the two persons who were standing with respondent at the bus stop. *Id.* at A45.

Respondent, who was then 16 years old, was charged in juvenile court with carrying a concealed firearm in violation of Fla. Stat. Ann. § 790.01 (1995), and possession of a firearm by a minor, in violation of Fla. Stat. Ann. § 790.22(3) (1995). Respondent moved to suppress the gun on the ground that it was obtained in violation of the Fourth Amendment to the Constitution. The district court granted the motion to suppress. Pet. App. A35.

2 Third District Court of Appeal reversed. Pet. App. A31-A34. The court held that when police officers verified all the details of the anonymous tip other than the existence of the gun, they had a reasonable suspicion that respondent was committing the crime of carrying a concealed weapon, and therefore had authority to stop and frisk him. *Id.* at A33. The court explained that "where a confirmed tip concerns an individual with a gun, the officer is faced with the choice of stopping

and searching the individual, or waiting until the individual brandishes or uses the gun and the latter choice is unacceptable, thus leaving the stop and frisk as the only reasonable choice." *Ibid.*

3. The Supreme Court of Florida quashed the decision of the Third District Court of Appeal. Pet. App. A1-A28. The court held that an anonymous tip concerning presently occurring criminal activity cannot give rise to reasonable suspicion when police can verify only the innocent details of the tip. Instead, the court held that an anonymous tip could serve as the basis for reasonable suspicion in three narrowly-defined circumstances: (1) when the tip relates suspicious behavior which the police verify as suspicious upon arrival; (2) when the tip contains predictions of future events that the police subsequently verify; and (3) when the tip is coupled with independent police work that uncovers additional suspicious circumstances. *Id.* at A5-A6. Applying that analysis, the court held that, because the tip in this case concerned presently occurring criminal activity and police verified only the innocent details of the tip, the police lacked reasonable suspicion to stop and frisk respondent. *Id.* at A7-A9.

The court acknowledged that other jurisdictions had held that police verification of the innocent details of an anonymous tip can create reasonable suspicion when the tip concerns a concealed firearm. Pet. App. A9-A10. The court rejected the reasoning in those cases, stating that "we determine that there is no firearm or weapons exception to the Fourth Amendment." *Id.* at A11.

Two judges dissented. Pet. App. A15-A28. The dissent observed that "[t]he possession without authority of a concealed firearm by any individual in a public place or at a public event is a prescription for disaster, but the possession of a concealed firearm by a child is

an especially dangerous and explosive situation." *Id.* at A15. Noting that "[t]he unfortunate reality of today's society is that dangerous persons of all ages stand armed and ready to shoot law enforcement officers and citizens," *id.* at A16, the dissenting judges concluded that, "when the police receive an anonymous tip alleging that a person is carrying an illegally concealed weapon and only the innocent details of the tip are verifiable, the police may conduct an investigatory stop and frisk of the suspect," *id.* at A18.

SUMMARY OF ARGUMENT

The Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that criminal activity is afoot, and, when the officer reasonably believes that the suspect may be armed and dangerous, the officer may frisk him for weapons. An officer's reasonable suspicion that an individual may be illegally carrying a concealed firearm justifies both a stop and a frisk. And that reasonable suspicion may be based on an anonymous tip that an individual of a particular description is currently in a particular place and is illegally carrying a concealed weapon, when the officer corroborates the observable facts in the tip and has no reason to find the tip unreliable.

In *Alabama* v. *White*, 496 U.S. 325 (1990), this Court made clear that an anonymous tip may furnish the requisite reasonable suspicion for an investigative stop. In that case, the reasonableness of relying on the tip was strengthened by the tip's accurate prediction of the suspect's movements. But the Court did not establish a bright-line rule in *White* that an anonymous tip must contain predictive details that the police confirm in order to establish reasonable suspicion. Nor would any

such rule accord with this Court's consistent recognition that reasonable suspicion turns on the "totality of the circumstances—the whole picture." *United States* v. *Cortez*, 449 U.S. 411, 417 (1981).

The totality of the circumstances necessarily includes not only the quality of the information in an anonymous tip and its reliability (as revealed through corroboration), but also the nature and immediacy of the threat flowing from the illegal activity described in the tip. Officers who receive an anonymous tip that an individual of a particular description is carrying a bomb outside of a courthouse, or is concealing an automatic pistol outside a school, cannot ignore the potential threat of violence when, upon arriving at the location, they find the described individual at the scene. The same is true when police receive an anonymous tip that a described individual is illegally carrying a concealed weapon in a public place. An anonymous tip that an individual has a gun will not always provide the reasonable suspicion to justify a stop and frisk; the question turns on the particular facts, assessed in a common-sense manner. But the potential for immediate and lethal use of the gun is a highly relevant factor in determining whether the police have reasonable suspicion for a stop and frisk.

All of the federal courts of appeals and the majority of the state courts that have considered the issue have come to that conclusion. In determining that a stop and frisk may be conducted in certain cases when police receive an anonymous tip that a described individual is carrying a weapon, those courts have emphasized the absence of any alternative course for the police to take that is consistent with protection of the officer's and the public's safety. For an officer to approach the individual and seek to engage him in a consensual conversation runs the risk that the officer may be shot. And for the

officer to observe and follow the individual as he moves about the streets may make it impossible for the officer to intervene before the individual uses the weapon in an act of violence, which could be fatal for innocent members of the public. A stop and frisk in that situation may strike the appropriate balance between the individual's privacy interests and the protection of public safety.

The state supreme court erred in rejecting all reliance on an anonymous tip that an individual has a gun where the officer cannot point to observable suspicious behavior or accurate predictions of future behavior. The court believed that to hold otherwise would create a "firearms exception" to reasonable suspicion analysis, but that is incorrect. The totality of the circumstances test accommodates consideration of the possible presence of an illegally concealed weapon in assessing what action officers may take in response to an anonymous tip. Nor does the approach we advocate permit officers to act on anonymous tips regardless of indicia of unreliability. Some tips may warrant no response, or only further investigation. But anonymous tips are often a valuable source of information in law enforcement. A categorical rule that deprives officers of the use of anonymous tips in forming a reasonable suspicion, absent the inclusion of accurate predictions of future behavior, places an unjustified restraint on the ability of the police to prevent violent criminal activity.

ARGUMENT

AN OFFICER CAN HAVE REASONABLE SUSPICION TO CONDUCT A STOP AND FRISK WHEN THE OFFICER CONFIRMS THE INNOCENT DETAILS OF AN ANONYMOUS TIP THAT A PERSON IS ILLEGALLY CARRYING A CONCEALED FIREARM

A. Reasonable Suspicion That A Person Is Illegally Carrying A Concealed Firearm Justifies A Stop And Frisk

1. In *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968), the Court held that police officers may stop and briefly detain a person for questioning when they have reason to conclude that "criminal activity may be afoot." The Court has subsequently made clear that the standard for a *Terry* stop is one of "reasonable suspicion supported by articulable facts." *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). That standard does not permit an investigative stop based on an officer's subjective hunch. *Ibid.* The level of suspicion for a *Terry* stop, however, "is considerably less than proof of wrongdoing by a preponderance of the evidence," and is "obviously less demanding than that for probable cause." *Ibid.* All that is required is "some minimal level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984). In evaluating the validity of a stop, a court must consider "the totality of circumstances—the whole picture." *Cortez*, 449 U.S. at 417.

The principle that an officer may conduct an investigative stop based on reasonable suspicion of wrongdoing serves government interests of overwhelming

importance. As explained in *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

2. In *Terry*, the Court also recognized that an officer who makes an investigative stop potentially places himself at great risk. Noting that "every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded," the Court concluded that police officers who make investigative stops should not be required "to take unnecessary risks in the performance of their duties." 392 U.S. at 23.

The Court therefore held that, when an officer has reason to believe that a suspect "may be armed and presently dangerous," the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30; *id.* at 17 n.13. Such a weapons search, known as a "frisk," is a "reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Id.* at

31. As the Court has subsequently explained, "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." *Adams*, 407 U.S. at 146.

3. Under *Terry*, not every investigative stop automatically justifies a frisk. In some cases, an officer may have reasonable suspicion that a crime is being committed, but the crime is not one that is ordinarily associated with violence, and the officer has no other basis for believing that the person suspected of the offense may be armed and dangerous. In such cases, the officer may conduct a stop, but not a frisk. Where the nature of crime itself supplies a reasonable suspicion that the suspect may be armed and dangerous, however, a reasonable suspicion that the crime is occurring simultaneously furnishes a justification for both a stop and a frisk.

That was the situation in *Terry* itself. The activities of the individuals involved in that case created a reasonable suspicion that they were planning a robbery, and it was "reasonable to assume," that such a crime "would be likely to involve the use of weapons." 392 U.S. at 28. The officer in *Terry* therefore had a justification for both a stop and a frisk. That same analysis is applicable when an officer has a reasonable suspicion that a person is illegally carrying a concealed firearm. Since it is reasonable to believe that a person committing a crime involving the illegal carrying of a concealed weapon may be dangerous, an officer who has a reasonable suspicion that such a crime is occurring may simultaneously stop and frisk the person suspected of the offense.

B. A Sufficiently Verified Anonymous Tip Can Create Reasonable Suspicion

1. In *Terry*, the officer's reasonable suspicion of wrongdoing was based on his own observations. Reasonable suspicion, however, can also be based on information supplied by another person. For example, in *Adams*, the Court held that an officer had a sufficient basis to conduct a stop and a frisk when a person known to the officer approached him and informed him that a man in a nearby vehicle was carrying narcotics and had a gun at his waist. 407 U.S. at 144-147. The Court expressly rejected the argument that a stop and frisk can only be based on an officer's personal observations, explaining that:

> Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of the assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

Id. at 147.

In *Adams*, the Court pointed out that information from a known informant presents a "stronger case [for reasonable suspicion] than obtains in the case of an anonymous telephone tip." 407 U.S. at 146. But anonymous tips, if sufficiently detailed and corroborated, may support a finding of even probable cause. In *Illinois* v. *Gates*, 462 U.S. 213 (1983), this Court sustained a warrant based on an anonymous letter to the police implicating a husband and wife in narcotics trafficking and predicting a travel itinerary involving a short round trip from Illinois to Florida, which turned out largely to be accurate. Even though the police were able to verify only innocent behavior, *id.* at 243 n.13, the Court held that the totality of the circumstances supported the issuance of the warrant in that case.

In *White*, 496 U.S. at 325, the Court held that a less-detailed anonymous tip that is sufficiently corroborated can establish reasonable suspicion for a *Terry* stop. There, police received an anonymous tip that Venesa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about one ounce of cocaine in a brown attache case. Police proceeded immediately to the apartment building, saw a person leave the 235 building with nothing in her hands, saw that person enter a car that matched the description given by the caller, and observed the person drive the car in the direction of Dobey's Hotel. Officers stopped the car just before it reached the Hotel. The Court held that, while the tip standing alone was insufficient to establish reasonable suspicion of wrongdoing, *id.* at 329, it was sufficiently corroborated to justify the investigative stop, *id.* at 330.

In reaching that conclusion, the Court acknowledged that police had not confirmed some of the significant details of the tip, including the name of the woman and the particular apartment from which she left, and it recognized that police had stopped the car without being certain that it would stop at the Hotel rather

than drive past it. 496 U.S. at 331. The Court concluded, however, that the tip had been sufficiently confirmed to warrant a reasonable suspicion of wrongdoing. *Id.* at 331-332. The Court explained that "it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations." *Ibid.* The Court gave particular weight to confirmation of the predictive elements of the tip, reasoning that a caller's ability to predict future behavior tends to demonstrate "inside information." *Id.* at 332. The Court stressed that "[b]ecause only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities." *Ibid.*

The lesson of *White* is that confirmation of significant aspects of an anonymous caller's predictions of future behavior can be *sufficient* to establish reasonable suspicion. *White* did not suggest, however, that verifying a prediction of future behavior is a *necessary* precondition for crediting an anonymous tip. Instead, *White* reaffirmed that the question whether a particular tip furnishes reasonable suspicion depends on "the totality-of-the-circumstances." *White*, 496 U.S. at 330. See *United States* v. *Bold*, 19 F.3d 99, 104 (2d Cir. 1994) (*White* does not establish categorical rule that anonymous tips must have predictive information that police confirm in order to establish reasonable suspicion); *United States* v. *Clipper*, 973 F.2d 944, 949 (D.C. Cir. 1992) (same).

2. Because the value of an anonymous tip in establishing reasonable suspicion depends on the totality of

the circumstances, the relevant standards, as with other reasonable suspicion inquiries, "are 'not readily, or even usefully, reduced to a neat set of legal rules.'" *Ornelas* v. *United States*, 517 U.S. 690, 695- 696 (1996) (quoting *Illinois* v. *Gates*, 462 U.S. at 232). As the Court has made clear, both the quantity and detail of the information as well as its reliability, as revealed by corroboration, are critical factors in assessing the worth of an anonymous tip. *White*, 496 U.S. at 330. But the reasonable suspicion calculus also takes into account the nature and immediacy of the criminal threat described in the tip. That factor plays an important role in determining whether a tip provides a sufficient objective basis to justify the investigatory step of a stop and frisk.

a. As for the quality of the tip, a tip that is definite about the occurrence of criminal activity is more likely to help create a reasonable suspicion than a tip that states only that criminal activity *may* be occurring. *In the Interest of H.B.*, 381 A.2d 759, 762-763 (N. J. 1977). A tip that is sufficiently specific and detailed to identify a particular person at a particular place is more likely to help establish a reasonable suspicion than a description that could potentially apply to numerous persons in an area. *Id.* at 761-762; *Speight* v. *United States*, 671 A.2d 442, 447-448 (D.C. 1995). And a tip that appears to be based on personal observation is more likely to help create a reasonable suspicion than one that appears to be based on second or third-hand knowledge. *State* v. *Williams*, 591 N.W.2d 823, 830 (Wis. 1999); see also *State* v. *Pulley*, 863 S.W. 2d 29, 32 (Tenn. 1993) (when an informant reports an incident at or near the time of its occurrence, it is often reasonable for police to adopt a working assumption that the tip is based on first-hand

knowledge); *State* v. *Hasenbank*, 425 A.2d 1330, 1333 (Me. 1980) (same).

b. As for reliability, confirmation of the innocent details of an anonymous tip lends some reliability to the report of wrongdoing. *Bold*, 19 F.3d at 103. Police need not confirm all details of a tip in order to have a reasonable suspicion of wrongdoing.[1] The Fourth Amendment requires neither "perfection" nor "infallibility." *Gates*, 462 U.S. at 245-246 n.14. The extent of corroboration is nonetheless relevant. The failure to confirm at least some significant details of the tip could readily undermine a finding of reasonable suspicion. In contrast, when police confirm all innocent details of a tip, that can lend significant support to a finding of reasonable suspicion. *United States* v. *Gibson*, 64 F.3d 617, 622-623 (11th Cir. 1995). The timing of corroboration is also significant. When police promptly arrive at the place that criminal conduct is allegedly occurring and immediately confirm the innocent details of a tip, it both helps to ensure that the reported information is not stale and reduces the possibility of detaining the wrong person. *Id.* at 623. When police do not arrive promptly, the inference of reasonable suspicion is weakened. *Speight*, 671 A. 2d at 447-448.

c. A critically important factor bearing on the totality of the circumstances is whether the tip concerns conduct that may pose an immediate danger of violence. For example, if an officer receives an anonymous tip that a person meeting a particular description is standing outside a particular federal building with a bomb, and police immediately verify that a person meeting that description is outside that building, police should be able to conduct a stop and frisk. Similarly, if police receive an anonymous tip that a person meeting a particular description is standing outside a particular elementary school and is carrying a concealed sawed-off shotgun, and police promptly confirm that a man meeting that description is outside that school, police should have authority to conduct a stop and frisk. What those examples have in common is that the reported conduct may pose an immediate danger of violence, and the only alternatives to an immediate stop and frisk—a consensual encounter or further observation—create an unreasonable risk of danger to the police and the public. See Wayne R. LaFave, *Search and Seizure* § 9.4(h), at 229 (3d ed. 1996) ("in some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information cannot be permitted to stand in the way of prompt police action").

Violence resulting from an individual's sudden use of an illegally concealed weapon presents particular dangers to the public. For example, in 1990, the use of firearms resulted in approximately 37,000 gunshot deaths and 259,000 nonfatal injuries. *Bold*, 19 F.3d at 104. Moreover, between 1987 and 1996, the use of firearms resulted in the deaths of 696 law enforcement officers, 92% of the officers killed in the line of duty. Pet. App. A16. An individual who is illegally carrying a concealed weapon thus poses a particular danger to the public.[2]

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[1] Thus, as noted above, although the police in *White* could not confirm several of the significant details of the tip, reasonable suspicion was nonetheless established. 496 U.S. at 331-332. And in *Gates*, confirmation of significant details of an anonymous letter was sufficient to establish *probable cause*, even though there was one significant mistake in the letter. 462 U.S. at 245-246 & n.14.

[2] Florida law prohibits a person from carrying a concealed firearm unless he is licensed to do so. Fla. Stat. Ann. § 790.01(2) and (3) (West 1999). A person under 21 years of age is not eligible

C. A Stop and A Frisk Are Generally Justified When An Anonymous Caller Reports That A Person Is Illegally Carrying A Concealed Firearm And Police Promptly Confirm The Innocent Details Of The Tip

As the preceding discussion makes clear, there is no categorical rule concerning when the combination of an anonymous tip and police corroboration can establish reasonable suspicion. Anonymous tips and police corroboration come in a variety of forms, and no rule can capture all the relevant permutations and combinations. But at least when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip, a stop and frisk should be permitted. In such cases, the totality of circumstances establish a "reasonable suspicion" that a particular person is engaged in criminal activity and may be armed and dangerous.

All of the federal circuits that have addressed the question have come to that conclusion. The leading case is *Clipper*, 973 F.2d at 944. There, the D.C. Circuit held that police officers had reasonable suspicion for a stop and a frisk when they obtained an anonymous tip that a person wearing particular clothing was at a particular location and was armed with a gun, and the officers promptly confirmed all the details except the existence of the gun. The court explained that the totality of the circumstances "must include those in which the anonymous informant makes no predictions, but provides the police with verifiable facts while alerting them to an

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for such a license. *Id.* § 790.06(b). Florida law therefore prohibits any person under 21 from carrying a concealed firearm.

imminent danger that the police cannot ignore except at risk to their personal or the public's safety." *Id.* at 949-950.

The court also emphasized that "an officer who has been able to corroborate every item of information given by an anonymous informant other than actual possession of a weapon is faced with an 'unappealing choice.'" *Clipper*, 973 F.2d at 951. "He must either stop and search the individual or 'at best follow him through the streets . . . hoping he [will] commit a crime, or at least brandish the weapon, out of doors,' where the police can intervene." *Ibid* (quoting *United States* v. *McClinnhan*, 660 F.2d 500, 502 (D.C. Cir. 1981)). The court added that "[t]his element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in 'controlled buys.' Where guns are involved, however, there is the risk that an attempt to 'wait out' the suspect might have fatal consequences." *Ibid.*

Similarly, in *Bold*, 19 F.3d at 99, the Second Circuit held that police had reasonable suspicion to conduct a stop when they promptly confirmed all the innocent details of an anonymous tip that a specifically identified man in a certain location was armed. Like the D.C. Circuit, the Second Circuit reasoned that "[w]here the tip concerns an individual with a gun, the totality-of-the-circumstances test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for a prompt investigation." *Id.* at 104. The court noted that 200 million handguns and other lethal firearms are in circulation in the United States, that more than 4.2 million are added each year, and that in 1990, those

weapons caused 37,000 gunshot deaths and 259,000 nonfatal injuries. *Ibid.* The court concluded that, given the report that the suspect was armed with a gun, the likelihood that the suspect's possession of the gun was illegal, and the inability of the officer to confirm that the suspect was armed, the officer had reasonable suspicion to conduct a stop. *Ibid.*

In *Gibson*, 64 F.3d at 617, the Eleventh Circuit reached a similar conclusion, upholding a stop and frisk of a man in a bar, based on an anonymous tip, swift confirmation of all the innocent details of the tip, and several other factors. The court emphasized that "the anonymous tip concerned the presence of two potentially armed individuals in a public establishment," and that "[t]his fact raised the stakes for the officers involved because they not only had to worry about their own personal safety, but that of the 20 to 40 innocent bystanders who were also present." *Id.* at 623.

Finally, in *United States* v. *Deberry*, 76 F.3d 884 (1996), the Seventh Circuit held that police had reasonable suspicion to conduct a stop when they confirmed the innocent details of an anonymous tip that a person was illegally carrying a concealed firearm. The court explained that "[a]rmed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that a person is armed, and as a realistic matter this will require a stop in all cases." *Id.* at 886.

The federal circuits do not stand alone in holding that officers ordinarily have authority to conduct a stop and frisk when they confirm the details of an anonymous tip that a person is illegally armed. The state courts that have addressed the question have generally reached the same conclusion. *In the Interest of H.B.*, 381 A.2d at 763-764 (To deny police the right to conduct a stop and

frisk "in the face of the violent climate of the times and the universal threat of handguns, * * * would seem foolhardy and wrong, and needlessly expose society and the police community to serious risk of death or injury."); *Hasenbank*, 425 A.2d at 1333 ("When police receive detailed and immediately verifiable information that a specifically described individual possesses a concealed weapon, the police are justified in stopping the person and conducting a limited protective search for weapons."); *State* v. *Jernigan*, 377 So.2d 1222, 1225 (La. 1979) (When an anonymous tip is sufficiently specific, police corroborate the details of the tip, and "the information, if correct, presents an immediate and real danger to the public, prompt police action is justified to prevent a possible serious harm."); *United States* v. *Johnson*, 540 A.2d 1090, 1092 (D.C. 1988) (Where tip provided "detailed information about the precise location where the suspect could be found and suggested an on-going crime involving the sale of a gun or guns," and there was "virtually immediate corroboration of all the innocent circumstances," police had reasonable suspicion to conduct an investigative stop.); *State* v. *Kuahuia*, 616 P.2d 1374, 1375 (Haw. 1980) (Where anonymous informant "detail[ed] the time, place, and his personal observation of the firearm," and police "promptly responded to verify and to act upon the information," and "especially because a firearm was allegedly involved, the police were duty-bound to make at least a temporary stop for investigative purposes."); *Pulley*, 863 S.W. 2d at 32-34 (Given the report of a presently occurring firearms offense, the corroboration of many of the details, and the threat of violence, police had a sufficient basis for an investigative stop.); *Speight*, 671 A.2d at 448 ("[T]he report that an individual was armed—potentially implicating the safety of both police

officers and the public—combined with the officers' corroboration of an extremely detailed description minutes after hearing the radio broadcast, justified the intrusion involved in briefly detaining and frisking the [suspect].''). The analysis of those courts is sound and should be followed here.

D. The State Court's Reasons For Precluding A Finding Of Reasonable Suspicion In This Case Are Unsound

The Florida Supreme Court, in finding that the officers lacked reasonable suspicion, raised two objections. First, the court believed that police verification of the innocent details of an anonymous tip that describes a presently occurring crime cannot, absent predictions of future behavior, sufficiently show that a tip is reliable. Pet. App. A3-A9. Second, the court reasoned that to hold otherwise would create a "gun exception" to the reasonable suspicion standard, *id.* at A9-A11. That reasoning is seriously flawed.

1. To take the later objection first, the approach we advocate does not create a "gun exception" to the reasonable suspicion standard. Instead, it simply recognizes that what constitutes "reasonable" suspicion depends in part on whether a tip describes a situation that could pose an immediate danger of violence.

That recognition is fully in keeping with the Court's stop and frisk decisions. In particular, the Court's cases instruct that the reasonable suspicion standard takes into account the "totality of the circumstances." *Cortez*, 449 U.S. at 417, that it is to be examined from the point of view of the "reasonably prudent" officer, *Terry*, 392 U.S. at 27, and that it does not "require that police officers take unnecessary risks in the performance of their duties," *id.* at 23. Given those teachings, the reasonable suspicion standard necessarily takes into

account what any "reasonably prudent" officer would consider: that when an anonymous caller reports that a person is illegally carrying a concealed firearm, and there is no reason to discredit the tip, the reasonably prudent course is to conduct an immediate stop and frisk. Public safety requires that the officer engage in some form of intervention before the weapon is deployed. If the officer must engage in a consensual encounter with the suspect and ask him whether he has a gun, he runs a risk that the response will be a bullet. And if the officer must await the brandishing of the gun, he runs the risk that the gun will be used on someone else before he can prevent it. The requirement that an officer have "some minimal level of objective justification" before conducting a stop or frisk (*Delgado*, 466 U.S. at 217), does not require an officer to run those risks.

The concept of "reasonable suspicion" is a "fluid" one that "take[s] [its] substantive content from the particular contexts in which the standard[] [is] being assessed." *Ornelas*, 517 U.S. at 696. The Fourth Amendment protects against "unreasonable" searches and seizures; it does not prevent officers from taking reasonable measures to prevent individuals from illegally walking the streets with concealed firearms. It is not "unreasonable" for an officer to conduct a stop and frisk when an anonymous caller reports that a particular person in a particular place is carrying an illegally concealed firearm, police officers confirm all the details of the tip besides the existence of the firearm, and there are no specific reasons to discredit the tip. A reasonable suspicion standard that led to a different conclusion would not fulfill its intended purpose of implementing the Fourth Amendment's protection against unreasonable searches and seizures. See *Terry*, 392

U.S. at 19 ("[S]top and frisk theory" should not "divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.").

In a variety of Fourth Amendment settings, the Court has held that the Fourth Amendment permits police to take reasonable steps to protect their own safety or the safety of others. *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997) (police may make an unannounced entry to execute a warrant when they have "reasonable suspicion that knocking and announcing their presence would, under the particular circumstances, be dangerous"); *Maryland* v. *Buie*, 494 U.S. 325, (1990) (police officers executing an arrest warrant in a house may take reasonable steps to ensure their safety including conducting a protective sweep for weapons based on reasonable suspicion); *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985) (police officer may use deadly force when they have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others"); *Michigan* v. *Long*, 463 U.S. 1032, 1052 (1983) (police may search the interior of car during traffic stop based on reasonable suspicion, in part because police officers are "particularly vulnerable" during such investigations). *Pennsylvania* v. *Mimms*, 434 U.S. 106, 106 (1977) (per curiam) (police may order driver out of car during traffic stop in order to protect the safety of the officer); *Warden* v. *Hayden*, 387 U.S. 294, 297-299 (1967) (When there are exigent circumstances, police officers who have probable cause do not need a warrant to continue a hot pursuit into a house and search for a robbery suspect and weapons he might use against them, since "the Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."). The principle underlying those cases is also applicable here.

2. The state supreme court's requirement of confirmed predictions before an anonymous tip can form the basis for reasonable suspicion would deprive the police of a source of valuable information that may prevent some violent crime. It bears emphasis that anonymous tips "frequently contribute to the solution of otherwise 'perfect crimes.'" *Gates*, 462 U.S. at 238. The value of anonymous tips would be significantly reduced if there were a categorical rule that only tips containing verifiable predictions of future behavior can create reasonable suspicion. Valuable tips come not only from "insiders" who have the ability to make predictions of future behavior, but also from persons who personally observe presently occurring crime in their own neighborhoods and wish to remain anonymous because of a bona fide fear of retaliation. *Williams*, 591 N.W.2d at 831; *United States* v. *White*, 648 F.2d 29, 43-44 (D.C. Cir. 1981); *United States* v. *Walker*, 294 A.2d 376, 377-378 (D.C. 1972). The Fourth Amendment should not be interpreted to categorically preclude officers from relying on such tips simply because the tips do not contain predictions of future behavior.

There is always a possibility that an anonymous caller who reports a presently occurring offense is someone with a grudge attempting to settle a score through a false claim of criminal conduct. But the same could have been said about the caller in *White*. Indeed, that was the basis for the dissent in that case. 496 U.S. at 333 (Stevens, J., dissenting). The Court's decision in *White* necessarily rejects the view that the mere

possibility that a caller is a dishonest person with a grudge, rather than a person with reliable information, undermines reliance on an anonymous tip.

Moreover, States, including Florida, make it a crime to provide a fraudulent report to the police. Fla. Stat. Ann. § 365.171(16) (West 1999) (false "911" calls); *Id.* § 817.49 (West 1999) (false reports of the commission of crimes to law enforcement officers). When combined with the increasingly common police practice of using caller ID to identify the telephone number and location of the caller, and the increasing public awareness of that practice, those laws can significantly deter the making of false reports. *LaFave, supra,* § 9.4, at 45-46 (2000 pocket part).

There remain legitimate concerns about reliance on anonymous tips. But when the tip concerns conduct as potentially dangerous as the illegal concealment of a firearm, police verify the innocent details of the tip, and no circumstances call into question the reliability of the tip, the public interest in preventing violence outweighs those concerns. Because the Florida Supreme Court failed to apply that analysis, and instead adopted the view that verification of the innocent details of an anonymous tip of a presently occurring crime can never provide reasonable suspicion, even when the crime consists of carrying a concealed firearm, its judgment should be reversed.

CONCLUSION

The judgment should be reversed and the case should be remanded for further proceedings.

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No. 98-1993

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In The
Supreme Court of the United States

THE STATE OF FLORIDA,
Petitioner,

vs.

J.L., A JUVENILE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE PETITIONER.

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BRIEF OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 17,000 members in 112 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the process of investigative stops of individuals based upon reasonable suspicion within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the subject.

Because of the relationship with our members, and

the composition of our membership and directors–including active law enforcement administrators and counsel–we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The Florida Supreme Court, *J.L., a juvenile v. State of Florida*, 727 So.2d 204 (Fla. 1998), against the overwhelming authority of state and federal case law in the United States, ruled that an anonymous tip that a youth wearing a plaid shirt and standing with other young black males at a particular location was carrying a gun, was insufficient to provide reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), in view of the tip's failure either to allege a suspicious activity that the police could verify or to accurately predict future behavior of the subject. It approved suppression of a handgun found on the juvenile in a classic stop and frisk confrontation, in spite of the fact that an officer with more than fourteen years of experience who had arrived on the scene within six minutes of the anonymous tip had verified all the details of the tip.

SUMMARY OF ARGUMENT

Based on our experience as law enforcement practitioners and administrators at the state and national levels, *amici* believe that the better-reasoned view is that the facts possessed by the officer in this case constituted reasonable suspicion under *Terry v. Ohio* for an

investigative stop and frisk of the juvenile. We state directly that we are not asking for an exception to *Terry v. Ohio*. We believe that the facts of this case fall squarely within the rule of *Terry v. Ohio, i.e.*, that the officer had abundant reasonable suspicion for her stop and frisk of the juvenile. This is part and parcel of the *Terry* holding, not an exception to it, and no stranger to recognition by the overwhelming majority of courts in the United States. These courts and *amici* recognize that a requirement of further investigative activity imposed on an officer in this type of situation is, in many cases, likely to be a bullet aimed at the officer or an otherwise violent confrontation that could have been avoided by common sense police work. The safety of our officers and citizens compels us to speak.

As this Court is aware, *amici* are not strangers to stop and frisk issues. AELE originally filed an *amicus curiae* brief in *Terry v. Ohio*, 392 U.S. 1 (1968), arguing for a common sense approach to police investigation of suspicious circumstances. Joined by other law enforcement organizations, we now submit that the time is ripe for this Court to apply *Terry* to one of the most common events in law enforcement practice today, anonymous tips concerning armed persons.

Our position grows out of a concern that the ruling of the court below–if affirmed–would leave officers defenseless in the face of such tips, even when verified to the extensive degree as found in this case. Refusal of this Court to recognize a reasonable, common sense application of *Terry* to the type of activity involved in this case would only worsen this condition, as well as leaving our communities unprotected as officers may opt

to avoid potentially violent confrontations.

We ask this Court to apply *Terry*, which *amicus* AELE supported by pointing out the common law origin of police investigative powers, and hold that the officer's conduct in this case was proper. **The ruling we seek is not an exception or extension of the rule of *Terry*, but what we submit is required by its holding.**

ARGUMENT

AN ANONYMOUS TIP STATING THAT A PERSON IS CARRYING A CONCEALED FIREARM AT A SPECIFIC LOCATION, CONTAINING A DETAILED DESCRIPTION OF THE PERSON AND HIS ATTIRE, IS SUFFICIENTLY RELIABLE TO JUSTIFY AN INVESTIGATORY DETENTION AND FRISK FOR WEAPONS IF THE POLICE IMMEDIATELY VERIFY THE ACCURACY OF THE TIP.

The police in this case received an anonymous tip that one of three young African-American males standing at a bus stop in front of a pawnshop at a specific and public location was carrying a concealed firearm. The tipster described the appearance of each of the young males and said that the individual with the gun was wearing a "plaid-looking" shirt.

Two officers responded within six minutes after receiving the tip. They immediately verified the accuracy of all of the appearance and location information provided by the tipster. J.L., a juvenile, was standing by

the bus stop with two other young African-American males and he was wearing a plaid shirt. Officer Carmen Anderson, a fourteen-year veteran of police work, approached J.L., asked him to put his hands above his head, and conducted a pat down of his outer garments. She then seized a gun that she saw protruding from the juvenile's left pocket. The juvenile was taken into custody and charged with unlawfully carrying a concealed firearm and possession of a firearm by a minor under eighteen years of age.

The Supreme Court of Florida ruled that the officer lacked reasonable suspicion for her conduct under *Terry v. Ohio*. A vigorous dissent was filed by Justice Overton, joined by Justice Wells.

The majority rule in the United States, which was rejected by the court below, is to the effect that when the police receive an anonymous tip alleging that a person is carrying a **concealed weapon** and only the innocent details of the tip are verifiable, the police may conduct an investigatory stop and frisk of the suspect.

Amici will not repeat the over twenty cases from state and federal courts affirming the rule. Only two cases in the United States appear to disagree–again, as cited in the parties' briefs–and these cases appear to be grounded in state (Pennsylvania and Massachusetts) constitutional provisions.

Thus, the State of Florida is in the mainstream of precedent in arguing for its position in this case. *Amici* add that the reality of police work involved in this case is often death or injury for the officers. As noted by the

dissenting opinion of Justice Overton:

> [We are] unable to ignore the daily headlines of our nation's newspapers and the statistics compiled by law enforcement agencies that reveal the great risk of harm posed by firearms in this country. According to the Uniform Crime Reports published by the Federal Bureau of Investigation, firearms claimed the lives of 92% of the 696 law enforcement officers killed in the line of duty from 1987 through 1996. Of those murders committed with firearms, 71% involved handguns–weapons that are easily concealed. Recent events have tragically demonstrated that children, such as the petitioner, and guns are an especially explosive mixture. The violence involving firearms at our nation's schools is a problem of major significance. Unfortunately, the majority has virtually ignored the great harm caused by firearms and has lost sight of the fact that the rationale of *Terry v. Ohio*, 392 U.S. 1 (1968), is to protect law enforcement officers and the general public from the dangers associated with armed suspects. It has also lost sight of a common sense definition of the term "unreasonable."

J.L., 727 So.2d at 211, footnotes omitted.

The prescription offered by the court below for the type of scenario faced by officer Anderson and her partner was simple: the police officers should have used a less intrusive means, such as a consensual encounter, to determine if the suspect was armed and dangerous

before a frisk would have been justified. It suggested a more reasonable approach would be to wait until some observable suspicious conduct took place in order to justify the frisk. It said that to approve the instant stop and frisk would create a "firearm exception" to *Terry*, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleged that an individual is carrying a firearm. It rejected this so-called "firearm exception" because it was unwilling to carve out a new exception from the original common law rule recognized in *Terry*.

Amici submit that the concept of a "firearm *exception*" to *Terry* is at the heart of the Florida court's faulty reasoning and conclusion. This Court has already made it clear that if an officer has a reasonable suspicion that a detained individual is armed and dangerous to the officer or others, a limited frisk for weapons may be conducted. *Terry*; *Minnesota v. Dickerson*, 508 U.S. 366 (1993). It has made it abundantly clear that such a stop and frisk is a "*limited* intrusion." *Adams v. Williams*, 407 U.S. 143, 148 (1972) (emphasis added).

Established precedents of this Court have also made it clear that under appropriate circumstances, an anonymous tip may carry sufficient indicia of reliability to justify an investigatory stop and frisk. *Alabama v. White*, 496 U.S. 325, 328 (1990). Under this Court's jurisprudence an anonymous tip's reliability is based in part on the specificity of the information provided and the ability of police officers to quickly and independently corroborate significant details of the tip. *White*, 496 U.S. at 331-32. The corroboration of only the innocent details of an anonymous tip concerning certain illegal activities,

such as the sale or possession of drugs, might be considered insufficient to provide police officers with a reasonable suspicion of criminal activity, but where the immediate safety of officers and the public from firearms is concerned, the reasonable suspicion equation turns out differently, as recognized by the overwhelming majority of courts that have considered the issue.

The use of the term, "firearm exception," to *Terry v. Ohio* is a diversion and an exercise in semantics that ignores the practical realities of police work that *Terry* was designed to deal with. It ignores what Professor LaFave succinctly refers to as the compelling realities of police work.

> It must be recognized that stoppings for investigation are not all of one kind and that in some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information cannot be permitted to stand in the way of prompt police action.

4 LAFAVE, SEARCH AND SEIZURE § 9.4(h), (3d ed. 1996) at 229.

Thus, while an officer possessing an anonymous tip about a drug transaction may be required to wait for additional corroborative facts to fall into place, officers in the position of officer Anderson have little room to maneuver. She knew that the anonymous tip concerning a juvenile with an illegally concealed firearm presented her with a unique situation. She knew that it was unlikely that she could verify more than the innocent details of the tip without substantially risking her safety or the safety of the other officer and the general public. She

knew her window of opportunity for action was small and closing quickly. She acted, and it would be surprising if one member of the law-abiding public out of a thousand would think her conduct anything other than simply doing her duty.

Equally importantly, the majority of courts in the United States would agree, finding that she had sufficient reasonable suspicion under *Terry v. Ohio*. As noted by the court in *United States v. Bold*, 19 F.3d 99 (2nd Cir. 1994):

> "The unique dangers presented to law officers and law-abiding citizens by firearms are well chronicled." [*United States v. Clipper*, 973 F.2d 944, 949-51 (D.C. Cir. 1992)]. An officer who is able to corroborate other information in an anonymous tip that another person is in actual possession of a gun is faced with an "unappealing choice." *United States v. McClinnhan*, 660 F.2d 500, 502 (D.C. Cir. 1981). He must either stop and search the individual, or wait until the individual brandishes or uses the gun. *Id.* At 502-503.

Bold, 19 F.3d at 104.

One might add to this the admonition of this Court in *Terry v. Ohio*:

> *The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger.*

Terry, 392 U.S. at 27 (emphasis added).

Amici submit that behind the rhetoric of the court below and its choice of terms implying an "exception" to *Terry v. Ohio* is the reality of (1) officer safety, (2) public safety, and (3) the precedents of this Court and others. From *Terry* to the most recent case law, this Court and others have recognized the common law right of officers to protect themselves and others from dangerous persons.

The standard of reasonable suspicion imposed upon police officers by *Terry* is a small price to pay for balancing individual interests in a free society against the public interest under the Fourth Amendment. The standard was met in this case. To argue otherwise ignores the common sense basis of *Terry* and the realities of everyday police work. A contrary holding would alter the landscape of police investigative activity involving dangerous weapons in a manner that a free society would quickly reject as an abdication of duty by its sworn police officers.

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

The STATE OF FLORIDA

Petitioner,

v.

J.L., a juvenile,

Respondent.

On Writ of Certiorari to the
Supreme Court of State of Florida

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONER

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II. An anonymous tip identifying the precise location and description of an armed suspect, if subsequently corroborated for the most part by a law enforcement officer, establishes sufficient reasonable suspicion and thus justifies a brief detention and an immediate search for the weapon, because to wait for the suspect to engage in suspicious conduct could have fatal consequences for officer and members of the public. 20

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Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of the Permissible Intrusion to Ascertain if a Detained Person is Armed,* 82 Marq.L.Rev. 491, 1999. 12

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Enforcement Officers Killes and Assaulted - 1997. . . . . 15, 16

L. Greenfield and M. Zavitz, Office of Justice Programs, U.S. Department of Justice, Bureau of Justice Statistics Selected Findings: *Firearms, crime and criminal justice—Weapons Offenses and Offenders,* November 1995. 17

National Parents' Resource Institute for Drug Education, *12th Annual PRIDE National Survey of Student Drug Use and Violence,* Washington, DC, September 8, 1999. 17

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO"), including its 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of the Petitioner State of Florida.[1] NAPO seeks to reverse the decision of the Supreme Court of Florida, which rejected the admissibility into evidence of a concealed handgun seized from the Respondent, a 16-year-old juvenile at the time of the incident.

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through education, legislation, and advocacy of fundamental due process and workplace rights of officers. NAPO represents 4,000 law enforcement organizations, with 250,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, and highway patrol officers, among other groups), and 11,000 retired officers. In Florida, NAPO represents the Florida Police Benevolent Association (which is comprised of 175 local units throughout the State), the Dade County Police Benevolent Association, and the Palm Beach County Police Benevolent Association, which altogether have approximately 37,000 sworn law enforcement officers as members.

NAPO's members have a significant interest in the important Fourth Amendment issues of law before this Court, as the Court's decision will affect the safety of law enforcement officers and directly impact their ability to carry out their responsibility to protect the public. This is because the stopping of an individual, whom a reasonable officer believes is armed and

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

dangerous, constitutes the least predictable and the most dangerous duty of a law enforcement officer. Consequently, the outcome of this case will bear on whether officers are allowed to adequately protect themselves by conducting a brief frisk or pat-down for weapons in such situations. In summary, NAPO seeks to provide insight into the reasonableness of the policy of allowing police officers to seize and disarm those individuals presenting a serious risk of injury or death to the officer and the public.

WRITTEN CONSENT OF THE PARTIES

Counsel of record for both the Petitioner and the Respondent have consented in writing to the filing of this *amicus curiae* brief, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition for a writ of certiorari. What follows is a shorter narrative of the facts and the proceedings.[2]

At the time of the incident, Respondent, J.L., was a 16-year-old male. Based on the Respondent's possession of the gun, a petition for delinquency was filed, charging the Respondent with unlawfully carrying a concealed firearm and unlawful possession of a firearm by an individual under 18 years of age.[3]

At the evidentiary hearing on the motion to suppress the admissibility of the gun into evidence, Officer Carmen Anderson testified that on October 13, 1995, while on patrol in Miami, she was dispatched to the area of 183rd Street and 24th Avenue in

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[2]The facts of the case were established in the evidentiary hearing held by the trial court on the Respondent's motion to suppress.

[3]Because the Respondent was a juvenile at the time of the incident, he remains identified only by his initials.

response to information received from an anonymous source. The source indicated that there were three young black (African-American) males standing at a bus stand near that intersection in front of a pawn shop, one of whom was carrying a concealed firearm. The anonymous informant also described each individual and said that the person carrying the firearm was the black male wearing a plaid shirt. [A-40-41].

Officer Anderson and another police unit arrived at the bus stop approximately six minutes after receiving the dispatch. As Officer Anderson and the other officer approached the bus stop, Officer Anderson saw three black males, one of whom was wearing a plaid shirt. The three males were found at the precise location where the anonymous informant said they would be. [A-41-42]. Officer Anderson immediately approached the Respondent, the male wearing the plaid shirt, because he fit the description of the individual who was allegedly carrying a concealed firearm. Officer Anderson asked the Respondent to place his hands on the bus stop sign, and the officer then began to frisk him, and upon doing so saw the butt of a gun coming out of the Respondent's left pants' pocket. Officer Anderson removed the gun and arrested the Respondent. [A-42]

The trial court found that the information provided by the anonymous source was insufficient to support a reasonable suspicion of criminal activity, and suppressed the gun as the product of an unreasonable search and seizure. [A-35-36]. The State of Florida appealed the suppression order to the District Court of Appeal of Florida, Third District. That court reversed the trial court's suppression of the handgun, concluding that there was reasonable suspicion that Respondent was committing the crime of carrying a concealed firearm and thus, the officer was justified in stopping and frisking him. The Third District held that the police officers found themselves, based on the extent of verification of the anonymous tip, in a situation where they had a reasonable suspicion that the Respondent was carrying a concealed weapon. Consequently, the court felt that the officers had to take some action, but in doing so, they also had to secure their own safety first. *State v. J.L.*, 689 So. 2d 1116 (1997).

The Respondent appealed to the Supreme Court of Florida, which reversed the decision of intermediate appellate court, and excluded the handgun as evidence. The court ruled that the information provided by the anonymous source did not give rise to the "reasonable suspicion" which the Fourth Amendment requires before the police may detain an individua! and frisk for weapons. Specifically, the Florida court held that an anonymous informant's detailed description of an armed suspect's clothing and location, even if verified by the police, is not enough to establish reasonable suspicion of criminal activity, including a concealed weapon. The court indicated that the officer should have used a less intrusive means, such as a consensual encounter or questioning about possession of a firearm, to determine if the suspect was armed and dangerous before a frisk would have been justified. *J.L. v. State*, 727 So. 2d 204 et seq. (Fla. 1998). The dissenting justices found the majority's interpretation of *Terry*, *infra*, to be overly restrictive and erroneous. The dissenting opinion concluded that, when confronted with this type of situation, police officers may not be able to verify more than the innocent details of the tip without substantially risking their safety or the safety of the general public. *Id.* at 214-215 (Overton, J. dissenting).

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches and seizures". The reasonableness of a search and seizure, including the brief detention and frisk of a suspect for a weapon, depends on a balancing between the suspect's right of privacy and the public interest in effective law enforcement, including officer safety. As this Court reaffirmed during its last term in *Knowles v. Iowa*, *infra*, officer safety in terms of disarming a suspect is "both legitimate and weighty".

Crucial to that balancing is the specific information possessed by law enforcement officers concerning the allegedly armed individual. If an officer holds a reasonable belief that his or her safety or that of others is in danger, based on the circumstances and facts known to the officer, he or she may

conduct a search based on "reasonable suspicion", under this Court's 1968 decision in *Terry v. Ohio*, *infra*. *Terry* authorizes investigatory detentions and searches for weapons whenever there is an articulable suspicion that a suspect is armed and dangerous. The principles of *Terry* apply to and govern the resolution of this case. In 1972, in *Adams v. Williams*, *infra*, this Court reaffirmed Terry and emphasized that the purpose of a protective search, if an officer has reason to believe that a suspect is armed and dangerous, is "to allow the officer to pursue his investigation without fear of violence, ... irrespective of whether carrying a concealed weapon violated any applicable state law." In fact, as the Court stated in *Terry*, it would be "clearly unreasonable to deny" an officer the power to take measures necessary to determine whether a suspect is in fact carrying a weapon and to neutralize that threat. To summarize, Justice Harlan's concurring opinion in *Terry*, an officer should not have to ask one question when confronting a suspect and "take the risk that the answer might be a bullet".

Statistical and other data disclose that concealed firearms and firearm crimes do pose a significant threat to officer and public safety. The data on officers killed or assaulted with firearms, as well as juvenile possession and use of firearms, including juvenile victims of crime, is devastating. For example, in 1995 alone, the year of the incident in this case, there were just over 500,000 murders, robberies, and aggravated assaults in which firearms were used, affecting 192 out of every 100,000 people in the United States. Indeed, firearms are used in approximately one-quarter of the incidents of violent crime committed in the United States, and are the type of weapon most frequently used in the slaying of police officers. For example, during the 10-year period from 1988 through 1997, 92 percent of the 688 police officers who were killed in the line of duty were killed with firearms. In addition, in 1998, the rate of officers killed with firearms rose even higher, to 95 percent, with all but three of the 61 officers dying from gunshot wounds. Moreover, most of these slain officers were shot at close range, in the front of the head or upper torso, within 10 feet of their assailants. Also, many were shot while investigating suspicious circumstances.

In this case, Officer Anderson could have been one of these statistics, if she had not conducted the frisk of the Respondent and removed his weapon. Her well-founded suspicions should not be ignored, as they were by the Florida court in this case.

If this Court should have any continuing doubts that the legitimate concern for officer safety outweighs Respondent's J.L.'s right of privacy in this case, then the Court should consider the important policy interests in protecting the public's safety, in view of the large number of juveniles carrying and killed by firearms each year. Indeed, there has been a startling increase in the number of crimes, especially murders, committed by juveniles using a firearm, during the last 10 years, notwithstanding an overall reduction in the rates of some violent crimes.

Societal expectations are a factor in determining whether an objective expectation of privacy should be recognized under the Fourth Amendment. The governmental interest in this case is much greater than that of routine crime detection. This is because the governmental interest in crime prevention is intensified when an armed and potentially dangerous individual threatens public safety. Therefore, as the governmental interest is greater, the level of corroborated information from an anonymous source necessary to constitute "reasonable suspicion" must be qualitatively different than in other types of cases. Otherwise, the balance between privacy and the governmental and societal interest will severely tilt in the wrong direction, as it did when this case was before the Florida Supreme Court.

Amicus curiae asks this Court to reject the Florida Supreme Court's holding that the corroboration of only the innocent details of an anonymous tip, due to the absence of suspicious details (other than possession of the firearm), does not provide police officers with a reasonable suspicion of criminal activity. The Florida court's majority opinion did not take into account that the great risk of harm to the public and the police in situations, such as this case, substantially outweighs the limited intrusion of the suspect's privacy. As the D.C. Circuit stated in

United States v. McClinnhan, *infra*, "[The] element of danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in 'controlled buys.' Where guns are involved, however, there is the risk that an attempt to 'wait out' the suspect might have fatal consequences."

Based upon this Court's decisions in *Terry* and *White*, *infra*, the D.C. Circuit's decision in *United States v. Clipper*, *infra*, and the Second Circuit's decision in *United States v. Bold*, *infra*, *amicus curiae* NAPO urges the Court to adopt the following standard as the appropriate one: Whenever an anonymous source alleges the presence of an individual armed with a concealed weapon, the verification by a law enforcement officer of the description of the suspect and the suspect's location is sufficient to establish reasonable suspicion to conduct a seizure of the individual and a quick search for weapons. A law enforcement officer should not be required to wait and endanger his or her life, either by questioning the suspect first or waiting for the suspect to initiate a suspicious act. The need to act is immediate in view of the high risk of injury and death.

Applying this standard to the instant case, the anonymous tip certainly meets the threshold of "reasonable suspicion". Here, the source of information provided the following details: First, there were three African-American juveniles standing at a bus stop near the intersection of 183rd Street and 24th Avenue in Miami; second, the bus stop was in front of a pawn shop; third, the juvenile dressed in a plaid shirt was carrying a concealed firearm, which, if true, would likely constitute a crime; and fourth, the three juveniles at the bus stop were each described. Arriving at the bus stop approximately six minutes after receiving the dispatch, Officer Anderson corroborated the information from the anonymous tip, information similar to or greater than the corroboration which occurred in *Alabama v. White*, *United States v. Clipper*, and *United States v. Bold*.

The danger to law enforcement officers and the general

public will significantly increase were this Court to require that law enforcement officers possessing and then verifying the same level of information, as did Officer Anderson in this case, must then independently observe or otherwise obtain information about an inherently suspicious circumstance before they can conduct a seizure and frisk for weapons. In summary, the Court should not sacrifice officer and public safety for minimal gains in search and seizure protection.

ARGUMENT

I. The safety of law enforcement officers is a crucial "public interest" factor to consider when analyzing the reasonableness of searches and seizures under the Fourth Amendment. Whenever an officer receives information indicating that a specific individual is possessing a concealed firearm in a public place, an immediate and severe threat of violence exists, as confirmed by government and other statistics. Such a situation immediately raises the legitimate and weighty concern for officer and public safety. This concern for safety outweighs any brief personal intrusion of a pat-down and frisk for weapons under the Fourth Amendment balancing test.

I

In the recent past, this Court has recognized that law enforcement officer safety is a crucial "public interest" factor in analyzing the reasonableness of searches and seizures of vehicles and their occupants under the Fourth Amendment. *Maryland v. Wilson*, 519 U.S. 408 (1997). In citing statistics on officer assaults and deaths, the Court stated, "Regrettably, traffic stops may be dangerous encounters." *Id.* at 413. This danger to an officer's life is no less existent when the officer confronts an unlawfully armed suspect on the street. Last term, in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 487 (1998), this Court reaffirmed that officer safety in terms of disarming a suspect is " 'both legitimate and weighty' " (citing from *Wilson, supra,* which

cited from *Pennsylvania v. Mimms*, 434 U.S. 106, 110, (1977) (per curium)).

The guiding principles for investigatory detentions and searches for weapons were established by this Court in *Terry v. Ohio*, 392 U.S. 1(1968). *Terry* establishes the crucial standards which govern the resolution of this case. Specifically, under *Terry* and its progeny of cases, an officer has authority to seize and search an individual for weapons where he has a "reasonable fear for his own and others' safety" based on an articulable suspicion that the suspect is armed and dangerous. 392 US. at 30. The language in *Terry* is instructive:

> The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

392 U.S. at 24. In support of this point, the *Terry* Court referenced FBI statistics, and discussed the number of law enforcement officers killed in the line of duty, and emphasized

that the majority of the officers died from gunshot wounds, stating that "[w]hatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power." *Id.* at 24 n.21. *Terry* then emphasized how unreasonable it would be to apply the Fourth Amendment in a way that would prevent officers from protecting themselves and others, stating:

> In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24. After balancing the individual's interest against the interest of officer safety, the Court came down squarely on the side of officer safety, making it clear that the authority is narrowly drawn "to permit a reasonable search for weapons for the protection of the police officer, ..." *Id.* at 27. Thus, the search is limited to what is appropriate for the discovery of weapons. As the Court further stated:

> The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonable designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.
>
> ...
>
> We conclude that the revolver seized from Terry was properly admitted in evidence

> against him. At the time he seized the petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized.

392 U.S. at 30. In his concurring opinion in *Terry*, Justice Harlan bluntly stated the risk of not conducting a limited search for weapons, stating:

> Concealed weapons create an immediate and severe danger to the public, ...
>
> ...
>
> There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

Id. at 32-33.

Four years later, this Court reaffirmed *Terry* in *Adams v. Williams*, 407 U.S. 143 (1972).[4] The unreasonableness of prohibiting such searches and seizures is clear. Indeed, as discussed in a recent law review article:

> Officers on the street confronting potentially armed and dangerous suspects are required to make a "quick decision" as to how to protect themselves. To subject their measurement

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[4]In *Adams v. Williams*, the Court emphasized that the purpose of a protective search, if an officer has reason to believe that a suspect is armed and dangerous, is "to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law." 407 U.S. at 146.

> of what is needed to protect themselves to post hoc second guess to scrutinize whether they engaged in the least intrusive means of effecting the goal of the intrusion places an unrealistic and dangerous burden on police officers. It is unrealistic because it requires them to "exercise superhuman judgment" in always choosing the least intrusive means of accomplishing the goal, and it is dangerous. Because it would "inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves." It is inconsistent with the view that deference should be given to the experience of police officers in assessing the reasonableness of their actions.[5]

Therefore, with reasonable suspicion a law enforcement officer may appropriately detain and then quickly frisk an individual for weapons, to protect the officer and the public from risk of injury and death.

II

The statistical and anecdotal evidence concerning the unlawful use of firearms used in committing murders of assaults against law enforcement officers and others, intensifies this concern. As the dissenting opinion from the Florida Supreme Court in this case stated:

> The possession without authority of a concealed firearm by any individual in a public place or at a public event is a prescription for disaster, but the possession of a concealed firearm by a child is an especially dangerous and

[5]Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of the Permissible Intrusion to Ascertain if a Detained Person is Armed,* 82 Marq.L.Rev. 491, 518, 1999 (footnotes and other citations omitted).

> explosive situation. ... In my view, the majority also makes a poor public policy decision that is dictated neither by law nor by common sense. The majority decision is not only bad public policy--I believe it threatens the physical safety of the law enforcement officers and citizens of this state. ... Under the circumstances of this case, stopping and frisking this child and seizing the concealed weapon is not unreasonable.
>
> The unfortunately reality of today's society is that dangerous persons of all ages stand armed and ready to shoot law enforcement officers and citizens. I am unable to ignore the daily headlines of our nation's newspapers and the statistics compiled by law enforcement agencies that reveal the great risk of harm posed by firearms in this country. ... Recent events have tragically demonstrated that children, such as the petitioner [the Respondent], and guns are an especially explosive mixture. [Footnote omitted.] The violence involving firearms at our nation's schools is a problem of major significance. [Footnote omitted.] Unfortunately, the majority has virtually ignored the great harm caused by firearms and has lost sight of the fact that the rationale of Terry v. Ohio ... is to protect law enforcement officers and the general public from the danger associated with armed suspects.

J.L. v. Florida, 727 So.2d at 211 (Overton, J. dissenting).

Unlawfully concealed firearms and firearm crimes do pose a significant threat to officer and public safety. The data on officers killed or assaulted with firearms, as well as juvenile possession and use of firearms, including juvenile victims of crime, is overwhelming. For example, in 1995 alone, the year of the incident in this case, there were 504,421 murders, robberies, and aggravated assaults in which firearms were used, affecting

192 out of every 100,000 people in the United States.[6] Indeed, firearms are the weapon most frequently used in the slaying of police officers,[7] and are used in approximately one-quarter of the incidents of violent crime perpetrated in the United States.[8]

The poignant words of a senior FBI official, spoken during a law enforcement memorial dedication, convey the extent of the epidemic of violence against officers.

> We must realize that law enforcement officers face danger on a daily basis. Since 1988, nearly 700 law enforcement officers throughout the country have been slain in the line of duty, another 629 have been killed in duty-related accidents, and over 600,000 officers have been assaulted. While progress is being made fighting crime, violence remains a serious threat to those who have sworn to protect society. Yet, even with the challenges facing law enforcement, brave men and women continue to join these ranks and swear to work each day to preserve the peace and improve the safety of towns and cities across America. Whether a seasoned veteran or a rookie just out of training, these heroic men and women, and their fallen colleagues whom we honor today, come from many different backgrounds. However, they are linked by a common ideal — that freedom is worth defending and that justice shall prevail. ... [9]

The rate at which handguns are used to kill or assault officers is dramatic. During the 10-year period from 1988 through 1997, 92 percent of the 688 police officers killed in the line of duty were killed with firearms.[10] In 1998, the rate of officers killed with firearms rose even higher, to 95 percent, with all but three of the 61 officers dying fr[illegible] gunshot wounds.[11]

Other FBI data reporting on the circumstances at the scene of these murders during this 10-year period is particularly informative. First, 469 slain officers, or 74 percent of the total, were shot in the front of the head or upper torso and were within 10 feet of their assailants.[12] Second, 128 officers, or 19.3 percent, of the 633 officers murdered were investigating suspicious circumstances, ranking second only to the 250 officers, or 39.5 percent, killed in arrest situations.[13] Third, the largest percentage of victim officers were assigned to vehicle patrol when they were killed, and specifically 49 percent of these patrol officers were

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[6]Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, November 1999 (found at <www.ojp.usdoj.gov/bjs/glance/guncrime.txt>); this information is based on calculations of data from the FBI Uniform Crime Reports.

[7]Federal Bureau of Investigation National Press Office, Press Release, May 10, 1999, Washington DC.

[8]U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Characteristics of Crime, Summary Findings: Violent Crime* (found at <www.usdoj.gov/bjs/cvict_c.htm>)last revised September 1999.

[9]Federal Bureau of Investigation, U.S. Department of Justice, *Law Enforcement Officers Killed and Assaulted - 1997,* from "Foreword", by James V. DeSarno, Jr., Assistant Director in Charge, Criminal Justice Information Services Division, (Excerpts from a speech given at Law Enforcement Memorial Ceremony, Clarksburg, West Virginia, May 14, 1998); the FBI's report may be found on the Internet at: <www.fbi.gov.ucr/killassl.htm>.

[10]*Id.* at 4.

[11]FBI National Press Office, *supra,* note 7.

[12]Federal Bureau of Investigation, U.S. Department of Justice, *Law Enforcement Officers Killed and Assaulted - 1997,* at 4 & 15. (See note 9, for the Internet location of this document.)

[13]*Id.* at 27.

alone and unassisted at the time of their deaths.[14] Fourth, of the 950 persons identified in these felonious killings of officers that occurred over the 1988 to 1997 period, 99 (10 percent of those identified) were under 18 years of age.[15]

Turning to data on assaults during the period of 1988 to 1997, we find that over 600,000 officers were assaulted.[16] The FBI's data on law enforcement officers assaulted in 1997, the most currently available data, reveal that 49,151 line-of-duty assaults were reported, an average of 11 of every 100 law enforcement officers in the nation, and that these assaults resulted in personal injury to 13,105 officers. Eleven percent of the assaults, specifically 5,446 incidents, occurred while officers were investigating suspicious persons or circumstances; and 1,844 (or 3.8 percent) of the assaults involved an assailant's use of a firearm. During 1997, four out of every five officers assaulted were on vehicle patrol at the time they were attacked.[17]

What these statistics do not convey, however, is the very personal and tragic loss to the families and communities of law enforcement officers slain in the line of duty. The FBI's 1997 data (referenced in footnote 12) provides summaries of each of the incidents leading to the murder of law enforcement officers.[18] What comes across from reading these summaries is how quickly an officer approaching a suspect can be killed. An officer does not have the luxury of having time to stand back and carefully formulate and ask questions. Indeed, within one or two seconds, a suspect can shoot and kill an officer. Unfortunately, the

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[14] *Id.* at 3.

[15] Bureau of Justice Statistics, *supra*, note 6, at 36.

[16] Federal Bureau of Investigation, U.S. Department of Justice, *Law Enforcement Officers Killed and Assaulted - 1997*, at 4.

[17] *Id.* at 69--70.

[18] *Id.* at 41--67.

majority opinion by the Florida Supreme Court did not consider this issue in rendering its decision.

Should there continue to be any doubts within the Court that the legitimate concern for officer safety outweighs Respondent's J.L.'s right of privacy in this case, then *amicus curiae* would ask the Court to consider public safety as well, in view of the number of juveniles carrying concealed firearms and the number of juveniles killed by firearms.

For example, a recent extensive national survey of 138,079 students by a non-profit institute, revealed the following: First, an estimated 2.6 million American youth, ages 11 to 18, carried a gun last year for either "protection" or to serve as a "weapon"--an armed population almost twice the size of the active duty U.S. military. Second, of these 2.6 million, more than one million (4 percent) armed themselves "often" or "a lot". Third, at least 800,000 students (3.3 percent) took a gun to school, and of those more than half (2.1 percent) carried a gun to school on two or more occasions. Fourth, students who carry guns for protection or as a weapon "exhibit high rates of other disturbing behaviors", with almost half using illicit drugs at least monthly and almost a quarter using drugs daily. Fifth, 61 percent of the 2.6 million carrying guns to school have been in trouble with the police.[19]

Moreover, arrests of juveniles comprise an increasing proportion of the violent crime and weapons arrests each year.[20] In 1997, for example, 123,400 juveniles were arrested for violent

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[19] National Parents' Resource Institute for Drug Education, *12th Annual PRIDE National Survey of Student Drug Use and Violence*, Washington, DC, September 8, 1999 (summary of survey can be found on the Internet at <www.prideusa.org/press99/9899gun.htm>).

[20] L. Greenfield and M. Zavitz, Office of Justice Programs, U.S. Department of Justice, Bureau of Justice Statistics Selected Findings: *Firearms, crime, and criminal justice--Weapons Offenses and Offenders*, November 1995, 3-4. (This data is available on the Internet.)

crimes,[21] comprising 17 percent of all such arrests,[22] while another 52,200 juveniles were arrested for weapons offenses (carrying, possessing, etc.), 24 percent of all such arrests.[23] This data does not indicate how many of the violent crimes committed by juveniles were carried out with firearms, but experts estimate that it is a large number.[24] It is clear, however, that the growth in murders by juveniles is linked to weapon use.[25] As the 1995 Annual Report of the Office of Justice Programs, U.S. Department of Justice, stated:

> There has been a startling increase in gun-related crime over the past 10 years. ... And an OJJDP [Office of Juvenile Justice and Delinquency Prevention] 1995 report--Juvenile Offenders and Victims: A National Report--shows that guns were used in 8 out of 10 homicides committed by juveniles.[26]

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[21]OJP defines violent crimes as encompassing specifically murder (and non-negligent manslaughter), forcible rape and robbery, and aggravated assault. In addition, "[f]ewer than half of serious violent crimes by juveniles are reported to law enforcement[.] Many crimes are never reported to police and never become part of official crime statistics." H.N. Snyder and M. Sickmund, *Juvenile Offenders and Victims: 1999 National Report,* U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, National Center for Juvenile Justice, Washington, DC, Sept. 1999, at 63.

[22]*Id.* at 115.

[23]*Id.*

[24]*Id.*

[25]*Id.* at 133.

[26]Office of Justice Programs, U.S. Department of Justice, *1995 Annual Report*, Chapter 2, 1--2. (From the text version obtained over the Internet.)

In its 1999 report, *Juvenile Offenders and Victims: 1999 National Report, supra*, the OJJDP's National Center for Juvenile Justice found evidence showing a link between juvenile murder arrest trends and weapons use, concluding that, "The age-specific arrest trend profile for weapons violations is comparable to that for murder, showing large increases for juveniles and young adults."[27] Indeed, while the murder rate for all persons above the age of 25 declined significantly over the 1980 to 1997 period, substantial increases were posted in rates of murder by juveniles and young adults.[28] Of the 18,200 persons murdered in the U.S. in 1997, about 1,400 were determined by law enforcement agencies to involve a juvenile offender.[29] The actual number, however, is greater because the FBI had no information on the offenders for about 6,900 reported murders (38 percent of the total), which included both unreported data and also homicides where no offender was identified.[30] The 1,400 murders which were known to involve a juvenile offender included about 1,700 juveniles and 900 adults.[31]

Moreover, the use of firearms as the weapon of choice by juveniles has increased: "The increase in homicides is tied to

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[27]H.N. Snyder and M. Sickmund, *supra,* note 21, at 133.

[28]*Id.*

[29]*Id.* at 53.

[30]*Id.*

[31]*Id.* Overall, the OJJDP estimates that "[i]n the U.S. in 1997, about 1 of every 16,000 youth between the ages of 10 and 17 was identified as a participating in a homicide. This is a rate of 56 known offenders for every 1 million youth in the U.S. population ages 10-17. ... Between 1980 and 1997, 75% of black juvenile homicide offenders used a firearm in their crimes. This proportion was higher than that for Asian/Pacific Islander (67%) white (59%), or American Indian (48%) youth. Youth were most likely to kill persons of their own race. Between 1990 and 1997, 81% of juvenile offenders were involved in murders of persons of their own race. ..." *Id.* at 56-57.

firearm use by nonfamily offenders[.] ... Most significantly, nearly all of the growth in juvenile homicides was in the number of older juveniles killed with firearms."[32]

II. An anonymous tip identifying the precise location and description of an armed suspect, if subsequently corroborated for the most part by a law enforcement officer, establishes sufficient reasonable suspicion and thus justifies a brief detention and an immediate search for the weapon, because to wait for the suspect to engage in suspicious conduct could have fatal consequences for officer and members of the public.

I

Under *Terry,* detentions and frisks for weapons are justifiable under the Fourth Amendment if there is an articulable suspicion that a person has committed or is about to commit a crime or is armed and dangerous. 392 U.S. at 26. This Court has addressed the level of suspicion necessary for a *Terry* stop, compared to that needed for an arrest. *United States v. Sokolow*, 490 U.S. 1, 7 (1989), stated: "[The] 'reasonable suspicion' necessary to justify a brief, investigative detention is a level of suspicion that is 'obviously less demanding than that for probable cause' and can be established by 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" In *Alabama v. White*, 496 U.S. 325, 330 (1990), this Court stated that the "reasonable suspicion" standard is different than the probable cause standard in terms of the quality and content of the information required to establish it; therefore, "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Id.*

The constitutionality of each investigative stop by an officer, including the seizure and search in this case, depends on the reasonableness of the officer's conduct, *State v. Jackson*, 434 N.W.2d 386, 389 (Wis. 1989), and hinges on "the facts available to the officer at the moment of the seizure or the search warrant

[32]Snyder, *supra,* note 21 at 19.

a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, 392 U.S. 1 at 21-22. In order to establish the reasonableness of an officer's conduct, the investigative stop must be "justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51(1979).

Great deference is shown to the officer's judgment, provided that the officer acted reasonably under the circumstances. In determining the reasonableness of the investigative stop, due weight must be given to the officer's experience and training, and the evidence (including inferences) must be viewed as it would "be understood by those in law enforcement." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Thus, the facts are viewed "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 565 N.E.2d 1271, 1273 (Ohio 1991). *See State v. White,* 660 So.2d 515, 519, (2nd Cir. 1995). As this Court stated in *Terry:*

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonable prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citations and footnote omitted.] And in determining whether the officer acted reasonably in such circumstances, due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

392 U.S. at 27.

> We cannot say [Officer McFadden's] decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the

> tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

Id. at 28. These statements apply equally to the instant case.

As in *Terry*, Officer Anderson in the instant case had to make a quick decision on how she could protect herself and the other officer on the scene. She immediately approached the male juvenile fitting the description of the individual allegedly carrying the concealed firearm. She asked the Respondent to place his hands on the bus stop. She removed the gun and arrested the Respondent. As discussed below, her decision to do so was in no way the product of a volatile or inventive imagination or taken to harass the Respondent. It was a tempered act that any reasonable police officer would have taken, based on the reasonable suspicion prevailing at that moment in time.

In *Alabama v. White*, *supra*, this Court considered the level of information from an anonymous source necessary create sufficient reasonable suspicion. There, as here, the information provided anonymously was not extensive but was corroborated by the police, and therefore the information exhibited a sufficient "indicia of reliability" to provide reasonable suspicion for an investigative stop. In *White*, the Court recognized that not every detail mentioned by such a source was verified or need be verified, stating:

> Because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, ... [Citation omitted.] Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.
> ... Because only a small number of people are generally privy to an individual's itinerary, it is

> reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. [Reference to citation omitted.] When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

496 U.S. at 332-333.

While being able to corroborate an anonymous informant's prediction of a suspect's future behavior is important, it is not determinative on the existence of "reasonable suspicion", especially in gun cases, where the danger of not acting is greater than it is in a drug case. As the D.C. Circuit stated in *United States v. Clipper*, 973 F.2d 944 (1992):

> *Alabama v. White* does not establish a categorical rule conditioning a Terry Stop (when police are acting on an anonymous tip) on the corroboration of predictive information. The Supreme Court in that case dealt with information that a particular individual was in possession of drugs, not of a gun. ...
>
> ...
>
> We believe that the totality of the circumstances to which the Court refers in *Alabama v. White* must include those in which the anonymous information makes no predictions, but provides the police with verifiable facts while alerting them to an imminent danger that the police cannot ignore except at risk to their personal or the public's safety. ... This conclusion reflects the Supreme Court's long-standing approach to Fourth Amendment jurisprudence. Any fair reading of Terry and its progeny reveals that those decisions involve a careful balancing of

interests. ...

973 F.2d at 949-950. In *Clipper*, the police received an anonymous call reporting that a black male armed with a gun was in the area of First and U Streets, NW, Washington, DC. The caller said that the individual was wearing a green and blue jacket and a black hat. Proceeding rapidly to the area, two officers observed an individual, the defendant, matching the description of the man. They stopped and frisked him, and during the frisk, one officer pulled out a bulge of money, which felt like a gun, and as he felt a bulge in the defendant's crotch, the defendant tried to run and dropped a bag containing crack cocaine while doing so. The motion to suppress this evidence was denied.

In *United States v. Bold*, 19 F.3d 99 (2d Cir. 1994) the police also relied upon an anonymous tip. There, the police received an anonymous tip that in the parking lot of a restaurant at the corner of Pennsylvania and Wortman Avenues in Brooklyn, there was a four-door gray Cadillac with three black males, one of whom was armed with a gun. The armed man was described as being 21-years old and wearing a hooded sweater. The police found the car, but because of tinted windows, they could not see the occupants and verify this part of the tip. They asked the car's occupants to step out. The police then observed incriminating evidence in the Cadillac. As contrasted with the instant case, where Officer Anderson was able to verify the descriptive details of the anonymous tip, the police in *Bold* were not able to immediately corroborate the details of that anonymous tip. Relying upon *Clipper* and other cases, the Court of Appeals found:

> The anonymous tip in this case did not itself provide information from which to conclude that the caller was honest or his information reliable. However, even before opening the car doors, the observations of the officers corroborated the tipster's report of a particular type of car ... in a particular location ... Verification of this information supports the reliability of the tip. ...

> Also, the location of the car in a remote part of the parking lot, as police officer Lavin testified, "raised my suspicion that they might be having something to hide." ...

19 F.3d at 103. In *Bold*, the Second Circuit concluded,

> Considering the totality of the circumstances in this case, including the limited ability of the officers to confirm all of the anonymous tip information, the report that the occupants of the car possessed a gun, and the statistical likelihood that the gun was illegal [the court discussed the magnitude of licensed and unlicenced guns in New York State], we conclude that the intrusion upon the privacy of the car's occupants was minimal and that the officers had a reasonable suspicion under *Terry* that authorized their opening of the car doors and questioning the occupants.

Id. at 104.

Under the foregoing precedents, the anonymous tip in the instant case certainly would meet the threshold of "reasonable suspicion". Here, the source of information provided the following details: First, there were three African-American juveniles standing at a bus stop near the intersection of 183rd Street and 24th Avenue in Miami. Second, the bus stop was in front of a pawn shop. Third, the juvenile dressed in a plaid shirt was carrying a concealed firearm, which, if true, would likely constitute a crime. And, fourth, the three juveniles at the bus stop were each described.

Arriving at the bus stop approximately six minutes after receiving the dispatch, Miami Police Officer Anderson, with backup of another officer, corroborated the information from the anonymous tip, similar to or greater than the corroboration which occurred in *Alabama v. White*, *United States v. Clipper*, and

United States v. Bold. The three black males, as described, were indeed found at the precise location where the anonymous informant said they would be, and one of the juveniles was indeed wearing a plaid shirt. As Officer Anderson proceeded under the *Terry* doctrine, she ordered the Respondent to place his hands on the bus stop sign and then, as she began to conduct a pat-down for weapons, she saw the butt of a gun coming out of the Respondent's left pants' pocket and she removed it. To not look for the firearm would have been unreasonable and a dereliction of duty. As the D.C. Circuit stated in *Clipper*, the Fourth Amendment does not "require a police officer to ignore his well founded doubts ..." 973 F.2d at 948.[33]

II

Societal expectations are a factor in determining whether an objective expectation of privacy should be recognized under the Fourth Amendment. The key to the resolution of this case is the nature and extent of the governmental interest involved, which, as Chief Justice Warren recognized in *Terry,* involve not only the detection of crime but also its effective prevention, an interest which becomes greater when an armed and potentially dangerous individual threatens public safety. 392 U.S. at 22.

Therefore, as the governmental interest is greater, the level of corroborated information from an anonymous source

[33]*Clipper* also addressed the concern about anonymous sources with grudges who might fabricate tips. The court stated, "[W]e are aware that anyone fabricating information runs a risk. Telephone calls to police stations are generally recorded, and the making of fraudulent reports is punishable by law. [D.C. statutory provision omitted.] Clipper has failed to cite any case or offer any evidence to suggest that the [D.C.] police have reason to discredit anonymous tips. Absent affirmative evidence of abuse, we cannot ignore society's plain interest in protecting its members, and those who serve them, from armed and dangerous persons." 927 F.2d at 951. In addition, *amicus curiae* would suggest that to ignore and not investigate such tips would eventually motivate anonymous sources *not* to provide information, significantly increasing the danger to the police and the public.

necessary to constitute "reasonable suspicion" must be qualitatively different than in other types of cases. Otherwise, the balance between privacy and the governmental and societal interest will severely tilt in the wrong direction, as it did when this case was before the Florida Supreme Court, with severe consequences for public safety.

In ruling that the officer's actions were unreasonable in this case, the Florida Supreme Court's majority opinion mischaracterized the holdings of other appellate courts nationwide, which have addressed and upheld the admissibility of evidence based on what that opinion called the "mere verification of a presently-occurring innocent detail tip" concerning the possession of a gun. The Florida court stated, "We are aware that other jurisdictions appear to recognize a 'firearm exception' to the reasonable suspicion test." 727 So.2d at 208.

This is a misstatement of the law. As Justice Overton's dissent pointed out, the "firearm exception" is not an exception to a "reasonable suspicion" standard, but rather an exception to the *usual* requirement that corroboration of innocent details from an anonymous source also include some finding of a suspicious circumstance. As the dissenting opinion stated,

> I would do what the majority of jurisdictions have done and recognize a "firearm exception" to the general rule that the corroboration of only the innocent details of an anonymous tip does not provide police officers with a reasonable suspicion of criminal activity. In my view, this holding is necessary because the great risk of harm to the public and the police in such a situation substantially outweighs the limited privacy intrusion to the suspect. Such a holding is true to the dictates of Terry ... Clearly, it is reasonable in today's society for law enforcement officers confronted with the circumstance presented in this case to conduct a stop and frisk.

Id. at 214--215.

The crucial U.S. Court of Appeals decision on this issue is *United States v. Clipper*, *supra*. There, what D.C. Circuit stated applies directly to the instant case:

> As we pointed out in [*United States v.*] *McClinnhan*, [660 F.2d 500 (D.C. Cir. 1981)], an officer who has been able to corroborate every item of information given by an anonymous informant other than actual possession of a weapon is faced with an "unappealing choice." [Page citation omitted.] He must either stop and search the individual or "at best follow him through the streets ... hope he [will] commit a crime, or at least brandish the weapon, out of doors," where the police can intervene. [Page citation omitted.]
>
> [The] element of danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in "controlled buys." Where guns are involved, however, there is the risk that an attempt to 'wait out' the suspect might have fatal consequences.
>
> Here, as in *McClinnhan*, the police received an anonymous tip providing a detailed description of the appearance, clothing, and location of a man who reportedly possessed a weapon. Officers at the scene were able to corroborate all of the innocent details of the tip. In these circumstances, we conclude that a reasonable trier of the facts could find that the officers had a reasonable suspicion sufficient to justify a Terry stop and search.

937 F.2d at 951.

Based upon *Terry*, *White*, *Clipper*, and *Bold*, the following standard is the appropriate one: Whenever an anonymous source alleges the presence of an individual armed with a concealed weapon, the verification by a law enforcement officer of the description of the suspect and the suspect's location is sufficient to conduct a seizure of the individual and a quick search for weapons, in view of the high risk of injury and death to the officer and the public at large. Because of a need to act immediately, a law enforcement officer should not be required to wait and endanger his or her life waiting for the suspect to initiate a suspicious act.

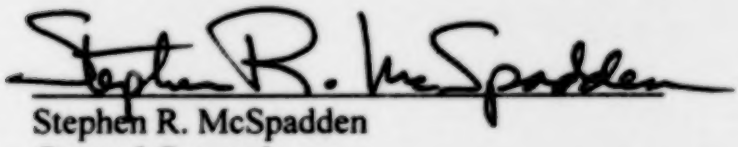
The danger to law enforcement officers and the general public will significantly increase were this Court to require that law enforcement officers possessing and then verifying the same level of information, as did Officer Anderson in this case, must then independently observe or otherwise obtain information about an inherently suspicious circumstance before they can conduct a seizure and frisk for weapons. There will be serious consequences if this Court affirms the Florida court's decision in this case and extends it nationwide. We do not exaggerate by stating that more officers, juveniles, and others will be murdered and assaulted if the Florida Supreme Court's decision in this case is not reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* NAPO urges this Court, first, to reaffirm the *Terry* doctrine and the important and legitimate public policy concerns about the safety of law enforcement officers and the public, and, second, to rule that the Fourth Amendment does not prohibit searches and seizures for weapons whenever law enforcement receives an anonymous tip of specific descriptive and locational information about suspects possessing firearms, information not otherwise especially suspicious except for the alleged possession of a deadly weapon. In sum, we ask the Court not to sacrifice public safety for minimal gains in search and seizure protection. Therefore, *amicus curiae* respectfully requests that the Court reverse the

judgment in this case of the Supreme Court of the State of Florida.

Respectfully submitted this sixteenth day of December, 1999,



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No. 98-1993

In the

Supreme Court of the United States

THE STATE OF FLORIDA,

Petitioner,

v.

J.L., A JUVENILE,

Respondent.

On Writ of Certiorari
To the Supreme Court of Florida

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WYOMING AND THE TERRITORY OF PUERTO RICO, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case addresses when an anonymous tip provides police officers with reasonable suspicion of criminal wrongdoing sufficient to justify a temporary investigative detention. The Court's resolution of that question will affect the practices of law enforcement agents and the admission in prosecutions of evidence obtained by state and local police officers who apprehend suspects after relying upon such anonymous tips. As the States' chief law enforcement officers, the undersigned Attorneys General have a direct and significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

In addition to a police officer's personal observations, the Court has allowed tips both by known informants, *Adams v. Williams*, 407 U.S. 143, 147 (1972), and by anonymous informants, *Alabama v. White*, 496 U.S. 325, 329-332 (1990), to provide the requisite reasonable suspicion of criminal wrongdoing sufficient to permit an investigative stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). While the Court has eschewed any rigid rule for determining when reasonable suspicion has been met in the context of an anonymous tip, it has, nevertheless, focused on several key factors in determining whether the totality-of-the-circumstances test has been met. These include: (1) the degree of intrusion of the search and/or seizure, (2) the extent to which the details of the tip are verified, and (3) the nature of the criminal activity alleged.

First, because an investigative stop is less intrusive than a full blown search or arrest, an officer need not have the same quantity or quality of information or the same level of certainty with respect to anonymous tips in the former context. Second, independent corroboration by the police of information

provided by the tipster increases the reasonableness of the officer's reliance on the tip. Finally, the totality of the circumstances must take into account the nature of the criminal activity alleged by the anonymous tip.

This Court's decisions extending protections to law enforcement officers in various contexts apart from those involving anonymous tips consistently sound a common theme – the Fourth Amendment does not prohibit an officer who is discharging his duty from taking reasonable steps to protect either himself or the public. The Court's concern for the danger to police should be particularly strong where, as here, guns are involved. Statistics, like those which the Court has relied upon in past decisions, reveal that handgun slaying and assaults pose a growing danger to officers, especially in situations similar to the disturbance call received here.

Application of the aforementioned factors compels a finding that, under the totality of the circumstances test, the anonymous tip here was sufficiently reliable to satisfy *Terry*. The limited nature of both the detention and the frisk, and the fact that all of the tip's descriptive details were immediately corroborated, distinguish the present situation from the "close case" the Court referred to in *White*. Most significantly, this case included an imminency (a gun) which was absent in *White*. The nature of this suspected criminal activity should weigh heavily in the Court's consideration of the totality of the circumstances and should lead to the conclusion that the anonymous tip here was sufficiently reliable to justify a *Terry* stop of J.L.

ARGUMENT

AN ANONYMOUS TIP WHICH STATED THAT RESPONDENT WAS CARRYING A CONCEALED WEAPON, AND WHICH CONTAINED PUBLICLY CONFIRMABLE DETAILS WHICH WERE IMMEDIATELY CORROBORATED, PROVIDED REASONABLE SUSPICION JUSTIFYING A TEMPORARY INVESTIGATIVE STOP

Since its decision in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has recognized that not every restriction on personal privacy or liberty sufficient to constitute a "search" or "seizure" requires the degree of individualized suspicion necessary to satisfy the probable cause standard. Instead, the Court's decisions establish that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

The standard applicable to investigative stops and pat-down searches under *Terry* "effects a needed balance between private and public interests." *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Although the reasonable suspicion standard precludes random or arbitrary seizures, or those based merely on a subjective "hunch," the burden of justification that it imposes "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7. Rather, that standard requires only "some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S.

210, 217 (1984); *see also United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

Determinations of reasonable suspicion are to be made based upon the totality of the circumstances or the "whole picture." *See Cortez*, 449 U.S. at 418. A trained police officer is given great latitude in assessing the "whole picture," including the consideration of "various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.* This Court has noted that "[f]rom these data, a trained officer draws inferences and makes deductions – inferences and deductions that might elude an untrained person." *Id.*

While such investigatory stops are often based on the officer's firsthand observation of a suspect's unusual or idiosyncratic behavior, the reasonable suspicion standard can be satisfied even without such observations. In *Adams v. Williams*, 407 U.S. 143, 147 (1972), the Court broadened the *Terry* standards by allowing reasonable suspicion to be established not only by police observation, but also by information received from a known informant. Anonymous tips have also been held to furnish reasonable suspicion for an investigative stop, particularly where some details of the tip were verified independently. *See Alabama v. White*, 496 U.S. 325, 329-332 (1990). Where, as here, the anonymous tip both has innocent details which have been confirmed, and is geared toward protecting the public from violent crime, the totality of the circumstances test has been met.

A. This Court Has Looked To A Variety Of Factors In Determining Whether An Anonymous Tip Is Sufficient To Justify A *Terry* Search And Seizure

The Court has recognized that the police ought not to ignore information solely because it is received from anonymous individuals. *See White*, 496 U.S. at 329-332; *Illinois v. Gates*, 462 U.S. 313, 327 (1983) (noting the utility of anonymous tips in solving otherwise "perfect crimes"). Still, the mere existence of an anonymous tip, standing alone, does not satisfy reasonable suspicion; "something more" is required. *See White*, 496 U.S. at 329 (*citing Gates*, 462 U.S. at 227). The variety of circumstances surrounding tips has dissuaded the Court from enunciating any clear test for determining what "more" may be required. As this Court noted with regard to using anonymous tips to justify issuance of a search warrant, "[r]igid legal rules are ill-suited to an area of such diversity." *Gates*, 462 U.S. at 232.

Despite the lack of a clear test, several key factors have informed the Court's decisions in the context of determining what justifies a search or seizure based on an anonymous tip. Among these key factors are: (1) the degree of intrusion of the search and/or seizure, (2) the extent to which the details of the tip are verified, and (3) the nature of the criminal activity alleged.

1. As noted, because a *Terry* stop entails a significantly smaller intrusion than a full blown search or arrest, an officer needs less certainty of wrongdoing before he can engage in such an investigatory stop. 392 U.S. at 25-26. This is reflected, of course, in the reasonable suspicion standard, which is a significantly lower standard than the probable

cause standard. *Id.* at 27. The lesser standard employed for determinations of reasonable suspicion, in turn, has a direct bearing on the utility of police officers' use of anonymous tips. In *White*, the Court held that the effect of this lower burden was that reasonable suspicion not only could be established with information that was different in quantity or content than that required to establish probable cause, but also could be established with information that was less reliable than that required to establish probable cause. *White*, 496 U.S. at 330 (*citing Adams*, 407 U.S. at 147). Consequently, despite the fact that the tip in *White* was not as detailed as that in *Gates* (which involved a warrant), nor the corroboration as complete, the anonymous tip provided the required suspicion. *White*, 496 U.S. at 329.

2. The extent to which information provided in anonymous tips is independently verified by the police is another relevant consideration. Because "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," some corroboration is usually needed to provide a basis to conclude that the information is reliable. *White*, 496 U.S. at 329. This flows from the common-sense notion that "because an informant is right about some things, he is more probably right about other facts." *Gates*, 462 U.S. at 244 (*quoting Spinelli v. United States*, 393 U.S. 410, 427 (1969) (White, J., concurring)). Consistent with the totality-of-the-circumstances approach, there is no bright-line amount of corroboration required. The reasonable suspicion determination involves a case-by-case review of the content of the information and its degree of reliability. *White*, 496 U.S. at 329. Thus, in *White*, the Court did not require that the police verify every innocent detail mentioned by the tipster. *Id.* at 331. Obviously, though, the more information

verified by the police, the more confidence the police can have in the reliability of the tip. The Court in *White* found the correct prediction of future behavior by a tipster to be powerful evidence of the tipster's reliability. *Id.* at 332. The Court did not, however, create a rule requiring that anonymous tips predict future events before they provide reasonable suspicion to conduct an investigatory stop.

3. The totality of the circumstances to which the Court refers in *Alabama v. White* must include those in which the anonymous informant alerts the police to an imminent danger that the police cannot ignore except at risk to their personal safety or the safety of the public. This conclusion reflects this Court's long-standing approach to Fourth Amendment jurisprudence. Any fair reading of *Terry* and its progeny reveals that those decisions involve a careful balancing of interests. *Terry* weighed the interest of the individual against the legitimate interest in "crime prevention and detection," and the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (*quoting Terry*, 392 U.S. at 22, 24). Of course, the interest of the individual detained and frisked pursuant to either a drug tip or a gun tip will not fluctuate; in either case, he seeks to avoid an "intrusion upon cherished personal security." *Terry*, 392 U.S. at 25. But the Government's interest in protecting its law officers and the public depends upon the nature of the criminal activity reported by the informant.

The Court's Fourth Amendment decisions post-*Terry* have served to extend protections to law enforcement officers in various contexts. Despite the varied facts, the language in

these cases clearly expresses a common conclusion – that the Fourth Amendment does not prevent the police from taking reasonable steps to protect their own safety or the safety of the public. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty."); *Long*, 463 U.S. at 1052 (allowing *Terry* search of the interior of an automobile, in part because officers are "particularly vulnerable" during such "close range" investigations); *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (noting that since the time the Constitution was ratified "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common" and this might "alter the judgment of what is 'reasonable' under the original standard"); *Maryland v. Wilson*, 519 U.S. 408, 413 n.2 (1997) (reaffirming that "[t]here is a strong public interest in minimizing the number of assaults on law officers"); *cf. New York v. Quarles*, 467 U.S. 649, 653 (1984) ("concern for public safety" was "paramount to adherence to the literal language in *Miranda*[*v. Arizona*, 384 U.S. 436 (1966)]").

Where the criminal activity reported by an informant involves guns, the governmental interest is particularly strong because of the potential for danger. *Terry* itself relied upon statistics totaling the number of deaths and assaults upon law enforcement officers as a result of gun violence. *Terry*, 392 U.S. at 24 n.21. Recent statistics only serve to heighten the governmental interest recognized in *Terry*. According to figures released by the FBI, since 1988, nearly 700 law enforcement officers throughout the country have been slain in the line of duty, another 629 have been killed in duty-related accidents, and more than 600,000 officers have been

assaulted. *See Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted* Foreword (1997) (*citing* excerpts from speech given at Law Enforcement Memorial Ceremony Clarksburg, West Virginia, May 14, 1998). In 1997 alone, nationwide there were 65 law enforcement officers slain feloniously in the line of duty. *Id.* at 3.[1] This total was 16 percent higher than reported in 1996. *Id.* The largest percentage of victim officers were assigned to vehicle patrol, as was the officer in the instant case. *Id.* Firearms continue to be the weapon most frequently used in the slaying of officers, accounting for 62 of the 65 slayings. *Id.* at 4. Handguns were the murder weapons in 44 of the killings, rifles in 12, and shotguns in 6. *Id.* In addition 49,151 law enforcement officers were assaulted during 1997, an average of 11 out of every 100 officers. *Id.* at 69.[2] And firearms were used in 4 percent of all assaults. *Id.* Most significant is the fact that 3 of every 10 of the reported assaults resulted from responding to disturbance calls akin to the one at issue here. *Id.*

The danger to the general public from the illegal use of firearms is also great. As of 1990, 200 million handguns and other lethal firearms were in circulation in the United States, with more than 4.2 million firearms being added to that total each year. *See United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994). These weapons caused some 37,000 gunshot

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[1]This figure represents reports received from law enforcement agencies in 29 states and the District of Columbia. *Id.*

[2]This figure represents reports received from 8,692 agencies covering 75 percent of the total United States population. These agencies employed a total of 451,980 officers. *Id.*

deaths in the United States in 1990, and approximately 259,000 nonfatal injuries. *Id.*

B. Under The Totality Of The Circumstances Test, The Police Had Reasonable Suspicion To Justify A Temporary Investigative Stop Of Respondent

Here, the police received an anonymous telephone tip that a concealed weapons violation was taking place. The informant told police that the individual with the gun was one of several young black males standing at a bus stand in front of a pawn shop at a particular location. The informant advised the police that the youth carrying the gun was wearing a "plaid-looking" shirt. Additionally, the informant gave descriptions of the other boys at the bus stop.[3] Officer Carmen Anderson, a police officer with more than fourteen years of experience, and another officer arrived at the scene just six minutes after receiving the anonymous tip. Respondent, J.L., was standing by the bus stop with two other young black males and he was wearing a plaid shirt. Officer Anderson approached J.L., since he fit the tipster's description of the individual with the gun, and asked him to place his hands on the bus stop. As she began to frisk J.L., she saw the butt of a gun "hanging out" of his left pants pocket. Pet. App. at 40-42.

An analysis of the three factors outlined in the previous section compels a finding that the anonymous tip here was

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[3]At the hearing on J.L.'s motion to suppress, Officer Anderson testified that the anonymous informant gave a description of each of the boys, but apart from recalling that one of the other two boys was wearing a "tan polo shirt" and the other a "color[ed] top," she could not recall "what other information" was given." Pet. App. at 40-41.

sufficiently reliable under *Terry*.[4] First, the investigatory detention here was brief, comprising only the amount of time necessary for the officer to instruct J.L. to place his hands on the bus stop. Pet. App. at 42. As soon as Officer Anderson started to frisk J.L., she saw the gun butt hanging out of his pocket. *Id.* The resulting search was equally limited. As soon as the officer saw the gun butt hanging out of J.L.'s pocket she felt the bulge and removed the gun from J.L.'s pocket and placed him in custody. Pet. App. at 42, 44.

Turning to the second factor, sufficient corroboration was established by police prior to the investigatory detention. Upon arriving at the scene just minutes after the tip, police were able to verify not some, but *all* of the tip's descriptive details. The tipster's information as to location, J.L.'s manner of dress, and the physical descriptions of J.L. and his two companions were all corroborated.

The adequacy of this level of corroboration is perfectly consistent with *Alabama v. White*. In *White*, the police received an anonymous telephone tip that Vanessa White would leave 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with a broken right taillight lens, that she would go to Dobey's

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[4]The most basic assumption of *Terry* is that a police officer must conclude that illegal or "criminal activity may be afoot." 392 U.S. at 30. Carrying a concealed weapon is illegal in some states. Although it is legal to carry a concealed weapon in Florida (if the person has a concealed weapons permit), minors, like Respondent, J.L., are prohibited both from carrying and possessing concealed weapons. *See* § 790.01(2), Fla. Stat. (1995); § 790.22(3), Fla. Stat. (1995). Since the anonymous tip here informed police that the individual in possession of the concealed weapon was "young," *see* Pet. App. at 40-41, the police were alerted to possible criminal wrongdoing.

Motel, and that she would possess approximately one ounce of cocaine inside a brown attache case. *White*, 496 U.S. at 327. The police proceeded to the apartment building, saw a parked vehicle matching the caller's description, observed a woman as she left the building and entered the vehicle, and followed her along the most direct route toward the motel, stopping her vehicle just short of the motel. *Id*. A consensual search of the vehicle revealed marijuana and, after White was arrested, cocaine was found in her purse. *Id*.

The Court concluded that, under the totality of the circumstances, significant aspects of the informant's tip were sufficiently corroborated to furnish reasonable suspicion. *Id*. at 331. This was so even though the tip contained no description of White, and the officers failed to make a positive identification of the driver during the investigative stop. *See White v. State*, 550 So.2d 1074, 1079 (Ala. Crim. App. 1989). In fact, the officers had no way of knowing the driver was actually White until she was arrested and processed. *Id*. The informant had indicated that White would carry a brown attache case as she left the building, but she did not. *White*, 496 U.S. at 331. The officers did not corroborate White's time of departure or the fact that she left from apartment 235-C. *Id*. Finally, the destination was not actually corroborated since the officers stopped her short of Dobey's Motel. *Id*.

The reliability of the tip in the case at bar compares favorably to the reliability of the tip in *White*. It is true that, unlike *White*, the anonymous tipster here did not predict future events. Here, however, *all* of the tip's descriptive details were corroborated. Moreover, the police corroboration of those details was immediate. Officer

Anderson testified that she arrived on the scene approximately six minutes after receiving the dispatch call concerning the tip. Pet. App. at 41.

Finally, turning to the third factor, the officers here were alerted to an imminent danger, a youth carrying a concealed weapon. The nature of the criminal activity involved here should be weighed heavily in considering the totality of the circumstances. In contrast to a tip regarding narcotics, like that at issue in *White*, this tip required immediate action by the police to avoid harm to the public or the officers themselves. If there is any doubt about the reliability of an anonymous tip in the former case, the police can limit their response to surveillance or engage in "controlled buys." But where guns are involved, there is the risk that an attempt to wait out the suspect might have fatal consequences. An officer who is able to corroborate other information in an anonymous tip that another person is in actual possession of a gun is faced with an "unappealing choice." *United States v. McClinnhan*, 660 F.2d 500, 502 (D.C. Cir. 1981). He must either stop and search the individual, or wait until the individual brandishes or uses the gun. *Id*. at 502-03.

For this reason, where a tip concerns an individual with a gun, the totality of the circumstances test for determining reasonable suspicion should include the consideration that the possible unlawful possession of a gun must be promptly investigated. "American Criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded." *Terry*, 392 U.S. at 23. It was a similar concern to combat crime while at the same time insuring police officer safety which led to the Court's

decision in *Terry*. That decision represented a clear statement of the dangers of dealing with criminals in the United States by emphasizing the easy access to firearms in this country. Specifically, the Court recognized that "this fact is relevant to an assessment of the need for some form of self-protective search power." *Terry*, 392 U.S. at 24 n.21. *Terry* also demonstrated the Court's understanding that law enforcement requires instantaneous decisions and that protection of the public would never be adequate if police could act only on probable cause. Without *Terry*, it is doubtful law enforcement officers could deal with the myriad problems they encounter on a daily basis. One such recurring problem involves a police officer responding to a tip concerning guns. In this context, the officer should properly be able to take these hazards into consideration in balancing the suspect's interests against the "need for law enforcement officers to protect themselves and other prospective victims of violence." *Id.* at 24.[5]

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[5]For these reasons, many lower courts have upheld protective investigative stops despite the tips' lack of extensive detail or prediction of behavior where an informant declares that a described individual is armed. *See, e.g., United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992) (an anonymous telephone tip that described an armed individual near a named location justified a protective search), *cert. denied*, 506 U.S. 1070 (1993); *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996); *United States v. Bold*, 19 F.3d 99 (2d Cir. 1994). Other courts have intimated that they would uphold protective investigative stops under similar circumstances. *See, e.g., United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996); *United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996); *United States v. Walker*, 7 F.3d 26, 30 (2d Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994). These cases reflect the concern that "[a]rmed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that the person is armed, and as a realistic matter this will require a stop in all cases." *DeBerry*, 76 F.3d at 886.

The *Terry* Court, no less than today's Court, was aware of the national concern with street violence. The facts of *Terry* for many seemed to typify the problems of urban crime: an officer stopped and searched three persons who appeared to be preparing an armed robbery of a downtown Cleveland store. The current experiences of our own contemporary society show that the struggle between the community and criminals is increasing in intensity and magnitude. It cannot be disputed that the tradition of armed violence by American criminals has increased since *Terry* was decided. Accordingly, the same concern for police safety that motivated the Court's decision in *Terry* and its progeny suggests that a finding of reasonable suspicion can be appropriate where police are investigating an anonymous informant tip involving a concealed weapon, despite the absence of predictive information.

Considering the totality of the circumstances in this case, including the officers' corroboration of all of the anonymous tip's descriptive details, and the report that one of the youths possessed a gun, this Court should conclude that the officers had a reasonable suspicion under *Terry* that authorized their stopping J.L.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to reverse the lower-court decision.

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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

J.L.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE THE JUSTICE COALITION IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location, with a detailed description of the person and his attire, is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip?

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INTEREST OF AMICUS

This brief is submitted on behalf of the Justice Coalition, which is a private, non-profit organization founded in 1995 whose primary purpose is to promote and protect the rights of innocent victims of violent crime.[1] The organization was founded by Ted Hires, Sr., a Jacksonville, Florida businessman who was a victim of an armed robbery at his barbecue business. The Justice Coalition was created to pull together concerned citizens who work for positive change in the criminal justice system to ensure community safety and justice for innocent victims and other law-abiding citizens.

Beyond providing advocacy and help for innocent victims of crime, the Justice Coalition is active in efforts to enact legislation that promotes public safety. It is one of the most highly visible organizations of its kind in the country by informing and educating the public about issues related to the criminal justice system through its monthly magazine, *Victims' Advocate*, its daily radio show, its affiliations with local media, and its website. Its volunteers daily attend criminal trials in Duval County, Florida that involve crimes of violence. Its volunteers are active in the community by providing direct, meaningful support for those who have lost loved ones or had their lives shattered by violence. In addition, it has joined forces with local television organizations to run "most wanted" segments and other programming that has resulted in the capture of hundreds of dangerous felons.

For its efforts, the Justice Coalition has received local, statewide, and national accolades. It has received the Federal Bureau of Investigation's highest civilian honor, the Director's Community Leadership Award. It has assisted the efforts of the Executive Office of the Governor of the State of Florida to

1. Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for either party, and that no person or entity other than amicus, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

promote public awareness of new legislation designed to reduce crime. Sheriff Nat Glover, State Attorney Harry Shorstein, and Mayor John Delaney have each worked with and praised the Justice Coalition for its efforts in making Jacksonville, Florida a safer community. Finally, the Justice Coalition monitors legal developments that affect the criminal justice system and ensures that the community is aware of such developments.

In conclusion, this brief is submitted because of the Justice Coalition's belief that our constitutional system is impaired when the law fails to account for the immense social costs that stem from violent crime. It respectfully suggests that the Florida Supreme Court's decision below interprets the Fourth Amendment in a way that takes too lightly the dramatic social cost of violence and significantly diminishes the ability of police officials to do their jobs.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court's decision should be reversed because it failed to consider and balance the interests of the government in avoiding the devastating social losses arising from the possession of handguns by juveniles. Innocent victims of violent crime shoulder the consequences of a legal rule that prohibits a minimally intrusive "stop and frisk" search under the circumstances presented. By neglecting the potentially devastating consequences of handgun violence, the majority opinion failed to achieve the proper constitutional balance under the Fourth Amendment.

As this Court has recognized, one of the most important factors in determining the reasonableness of a "stop and frisk" search is the safety of police officers as well as the general public. The government's interest in averting potential violence stemming from handguns is an obvious and vital one. The position of the dissenters below, as well as that expressed in the Eleventh Circuit's decision in *United States v. Gibson*, strikes the proper balance. Both take into account, and give greater weight to, the public safety concerns that arise when juveniles possess firearms in a public place. A so-called "anonymous tip"

may form the basis for a limited "stop and frisk" search if the information regards an imminent danger to public safety, is acted upon with immediacy, and is accurate and verifiable.

Tips involving guns are different. They cannot be ignored and are inherently perilous to investigate. As this Court recognized in *Terry*, the danger to police officers and the general public arising from illegal possession of concealed weapons is a critical factor in the balancing of interests under the Fourth Amendment. Here, the Florida Supreme Court failed to accord this interest sufficient weight. Under *Terry*, it is unreasonable for law enforcement officers and the general public to either ignore or be subject to the risks associated with unlawful possession of weapons in public places.

Further, the unique dangers posed by juvenile possession of firearms distinguish this case as well. The harm to society from minors illegally possessing and using firearms is an increasingly substantial social cost that weighs heavily in favor of the type of investigatory search that occurred below. The maintenance of order is a critical factor that justifies the type of minimally intrusive search that occurred in this case. Moreover, the Florida Supreme Court's decision in *J.L.* has spawned decisions among lower Florida appellate courts that have eroded the ability of police to maintain order in society and, at the margin, placed the lives of officers and the general public at greater risk.

In summary, the Justice Coalition respectfully suggests that this Court place great emphasis on the social cost arising from illegal possession of handguns by juveniles. The Fourth Amendment balance adopted below fails to accord this factor sufficient weight and thereby undermines the maintenance of order in society.

ARGUMENT

I. AVOIDANCE OF DANGER TO INNOCENT VICTIMS FROM UNLAWFUL JUVENILE POSSESSION OF FIREARMS TIPS THE BALANCE IN FAVOR OF A *TERRY* STOP IN THIS CASE

The Justice Coalition respectfully suggests that the proper balancing of interests recognized in this Court's *Terry*[2] decision is lacking in the decision below. Specifically, the decision endangers innocent persons by setting a legal standard that precludes police officers from conducting a minimally intrusive "stop and frisk" based upon a detailed yet anonymous tip that a juvenile possesses a handgun in a public place. Members of the Justice Coalition know firsthand the devastating impact a single bullet can wreak on the lives of police officers as well as innocent victims, their families, and their communities. The societal benefit of avoiding this type of harm should be given great weight in determining whether a particular search under the Fourth Amendment is warranted, particularly where a weapon is potentially in the hands of a juvenile.

A close analysis of the costs, benefits, and tradeoffs underlying the Florida Supreme Court's decision in *J.L. v. State*, 727 So. 2d 204 (Fla. 1998), demonstrates the inadequate weight given to public safety and the protection of law-abiding members of the public. While this Court has not adopted a rigid cost-benefit analysis, it has used a similar approach that balances competing interests in its search and seizure decisions, particularly as to the scope of the rule excluding illegally seized evidence.[3] A cost-benefit approach is also evident in the Court's

2. *Terry v. Ohio*, 392 U.S. 1 (1968).

3. *See, e.g., United States v. Leon*, 468 U.S. 897, 906-07 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974); *see generally* Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. Rev. 1, 7 (1991) ("To use the language often employed by the United States Supreme Court, analysis of any proposed rule involves balancing the 'costs' and 'benefits' of a given approach to the identified state and individual interests.") (footnote omitted).

analysis in other areas, such as the determination of "probable cause"[4] and determining standing issues.[5] In any event, cost-benefit analysis is clearly a tool that assists in clarifying what is at stake in this case.[6]

In this regard, the Court is undoubtedly familiar with the famous Hand Formula, which is used in a number of contexts to frame the costs and benefits associated with legal standards.[7] The Formula seeks to represent mathematically the balancing of social costs and benefits from the establishment of a legal rule. In his influential treatise, *Economic Analysis of Law*, Chief Judge Richard Posner discusses a cost-benefit approach to search and seizure law using the "Hand Formula to frame the inquiry."[8] He identifies three variables. First, the cost of the search in "impaired privacy" is denoted as "B." The more intrusive a search, the greater the magnitude of B. Second, the probability that without the search the target cannot be convicted is denoted as "P." This factor is composed of the probability that the search will "turn up something of value to the police (probable cause)"[9] as well as the probability that the "something" sought is "essential to conviction."[10] The greater the likelihood

4. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 238-39 (1983); Slobogin, *supra* note 3 at 7 n.16.

5. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978).

6. Other explanatory models are also useful. *See also* Christopher Slobogin, *Let's Not Bury Terry: A Call For Rejuvenation of the Proportionality Principle*, 72 St. Johns L. Rev. 1053, 1054 (1998) (call for rejuvenating the "proportionality principle" which is based on the premise that "a search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion of police action.").

7. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.") (Hand, J.).

8. Richard A. Posner, Economic Analysis of Law, 748 (5th Ed. 1998).

9. *Id.*

10. *Id.*

of a successful search for an item that is necessary to prove or prevent a crime, the higher the value of P. Finally, the social loss of not convicting the target for the offense at issue or avoiding the potential harm presented by the situation is denoted as "L." The graver the crime and its consequences to the community, the greater the value of L.

This formulation is useful because it leads to common sense results. First, a search is reasonable (and thereby permissible) if the value of B is less than the value of P multiplied by L (i.e., B<PxL).[11] In other words, a search is reasonable if the cost in terms of lost privacy to the individual is less than the expected loss to society if the search is not conducted. For instance, if a minimally intrusive search (i.e., low B) will avoid a potentially high social loss (i.e., high PxL), the search is reasonable and may be conducted. Likewise, a more intrusive search (i.e. higher B) is justified the graver the crime and its social loss (i.e., higher L). Of course, a highly intrusive search (i.e., high B) without reasonable suspicion (i.e., low P) is unwarranted except for only the most extreme and socially devastating crimes (i.e., very high L).

An important point is that search and seizure analysis should not myopically focus on only one factor, or give one factor dispositive weight. Instead, all factors must be balanced under the circumstances of each case to determine whether the particular search is reasonable under the Fourth Amendment. As Judge Posner has noted, courts appear to apply these factors in their analyses:

> The courts seem generally if imperfectly aware of these factors. A minimally intrusive search (i.e., low B) — a stop-and-frisk or pat-down — is permissible on a lower P than a search of the home or an arrest. If a search is necessary to prevent the imminent repetition of a crime, which is one of the things that can make L large, a lesser showing of probable cause will suffice. The intrusiveness of the search and the

11. *Id.*

> two components of P are routinely considered and the existence of alternatives to searches sometimes. *But the gravity of the crime usually is not considered, although logically it should be. In particular most courts seem unaware that a higher L will justify a lower P, the more serious the crime, the less probable cause the police should be required to demonstrate in order to justify a search of a given intrusiveness (B).*[12]

As the emphasized language indicates, some courts tend to overlook that a minimally invasive search is justified to avoid a sufficiently dangerous crime. That is precisely the situation below.

The majority opinion in *J.L.* focused almost exclusively on factors (B and P) other than the apparent danger and potential peril of disallowing investigatory searches in this context (i.e., the higher L that is associated with violence arising from handguns and juveniles). This interpretation of the Fourth Amendment, which prohibits a "stop and frisk" search of a juvenile who may possess a weapon, places greater value on the juvenile's right to be free from such searches than it does on the avoidance of harm (immediate or future) that might arise if the anonymous tip is indeed accurate.

In contrast, the dissenters (as well as federal appellate courts) place greater value on society's interest in maintaining order and avoiding violent crimes, and lesser importance on the juvenile's individual privacy interest.[13] This view, which

12. *Id.* (emphasis added).

13. For example, Justice Overton, one of two dissenters below, observed:

> [T]he United States Supreme Court, in formulating the "reasonable suspicion" test under *Terry*, balanced the privacy interests of citizens with the safety interests of police officers and the public. . . . I believe that a proper balancing of the interests demonstrates that the government's obligation to protect citizens and law enforcement personnel from violent crime *substantially*

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permits a minimally intrusive "stop and frisk" search under the circumstances at issue, avoids or significantly reduces potential harm to society (including harm to the juveniles themselves). It explicitly recognizes that the escalating social costs of gun violence, particularly among juveniles, justifies granting limited authority to law enforcement officials to undertake investigatory action more readily. In other words, this approach recognizes that the greater L posed by potential danger from the volatile mix of juveniles and guns more than compensates for the lesser showing of suspicion (i.e., the lower P) provided by the anonymous tip.

This type of balancing and cost-benefit analysis is neither novel nor merely conjectural. Instead, as discussed below, this analytical approach finds support in *Terry* itself as well as decisions applying *Terry*. Federal appellate decisions, including controlling precedent of the Eleventh Circuit Court of Appeals (whose jurisdiction includes Florida), have used this approach to uphold "stop and frisk" searches to avoid the presumptive danger arising from illegal handgun possession. As discussed below, each of these decisions recognize the importance of avoiding violent crimes and other social losses that can be averted with minimally intrusive searches.

A. Potential Harm To Society, Particularly To Innocent Victims Of Violent Juvenile Crime, Is The Critical Factor In Upholding The "Reasonableness" Of A *Terry* Search Under The Circumstances Presented

The touchstone of this Court's analysis in *Terry* of the constitutionality of the "frisk" or pat-down search for weapons was the "reasonableness" of the search.[14] Whether a search is

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> *outweighs* an individual citizen's interest against the limited privacy intrusion of a *Terry* stop and frisk.

727 So. 2d at 211-12 (footnote omitted; emphasis added).

14. The Court in *Terry* held, apparently for the first time, that the "probable cause" standard of the Warrant Clause of the Fourth Amendment does not apply to a "frisk" or pat-down search of an individual for weapons:

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reasonable requires a balancing of two competing factors, which are "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," 392 U.S. at 21 (quotation omitted), and "the nature and quality of the intrusion." *Id.* at 24. As this Court acknowledged, there is " 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " *Id.* at 21 (quotation omitted).

In applying the reasonableness standard to the pat-down search in *Terry*, this Court recognized that more was at stake than the government's generalized interest in "effective crime prevention and detection," which is present in virtually every citizen-law enforcement encounter. *Id.* at 22. Although the police officer was justified in investigating what he considered to be suspicious behavior (in an effort to prevent a robbery) when he first approached Terry and his companions, this Court recognized that the limited search was justified by an even greater interest:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that

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> We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. *But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.*

392 U.S. at 20 (citations omitted; emphasis added).

> the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

Id. at 23. In weighing this substantial governmental interest, this Court took into account the reality of gun crime in twentieth-century America:

> Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

Id. at 23-24 (footnote omitted). In doing so, this Court explicitly recognized the needs of law enforcement officials to protect themselves and the public from the dangers of handgun violence, risks that escalate when a juvenile is armed.

The Court also cited the Federal Bureau of Investigation's 1966 Uniform Crime Reports for the United States, which reported that fifty-seven law enforcement officers were killed in the line of duty that year (fifty-five by gunshot wounds, two by knives). *Id.* at 24 n.21. Of the fifty-five who died from gunshot wounds, forty-one were killed with handguns. *Id.*[15] In other

15. The figures from 1988 through 1997 are equally alarming. According to Federal Bureau of Investigation statistics, 688 law enforcement officers were killed in the line of duty between 1988 and 1997, of which 633 were killed by firearms, including 492 by handguns. UNIFORM CRIME REPORTS FOR THE UNITED STATES, 17 (1997) (visited December 22, 1999) ("Law Enforcement Officers Killed and Assaulted") <http:www.fbi.gov/ucr/killed/97killed.pdf>. In 1994 alone, seventy-nine law enforcement officers were killed, all but one of which were killed by firearms. *Id.* Equally alarming are the circumstances under which many law enforcement officers were killed by firearms. For instance, of the 633 officers killed by firearms between 1988 and 1997, *more*

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words, 96% of the officers died from firearms of which 72% were handguns. These statistics, of course, did not include non-fatal injuries to officers or fatalities or injuries to persons other than officers arising from firearms.

Weighing the grim statistics of gun violence against police officers versus the "brief, though far from inconsiderable, intrusion upon the sanctity of the person," *id.* at 26, this Court in *Terry* concluded as follows:

> In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves *and other prospective victims of violence* in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer *or to others*, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24 (emphasis added). For this reason, this Court held "there must be a narrowly drawn authority to permit *a reasonable search for weapons for the protection of the police officer*, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27.

This Court in *Terry* was as concerned about the safety of innocent bystanders as it was with the safety of law enforcement officers. For instance, it was noted that the "sole justification of

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than half, 337, were five feet or less from the perpetrator at the time they were killed. *Id.* at 18. Moreover, 253 of the 633 officers killed by firearms in the line of duty between 1988 and 1997 were wearing body armor at the time they were killed. *Id.* at 19. These statistics starkly illustrate the risk faced by police officers who approach a potentially armed suspect.

the search in the present situation is the protection of the police officer *and others nearby*" to the area. *Id.* at 29 (emphasis added). In upholding the search, the Court found that the officer reasonably believed "it was necessary for the protection of himself *and others* to take swift measures to discover the facts and neutralize the threat of harm if it materialized." *Id.* at 30 (emphasis added). Moreover, where an officer has a "reasonable fear for his own *or others' safety*, he is entitled for the protection of himself *and others in the area* to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* (emphasis added). Subsequent decisions of this Court have reinforced this essential point.[16]

The *Terry* decision also recognized the significant invasion of personal privacy inherent in a pat-down search for weapons. Such a search is not a mere "petty indignity" and is limited to only that degree of intrusiveness necessary to check for weapons.

> A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

Id. at 25-26 (citation omitted). Restricting the scope of a pat-down search limits the degree of intrusiveness (B) and is a check

16. *See, e.g., Maryland v. Buie*, 494 U.S. 325, 333-34 (1990) (limited protective sweep of house in which arrest occurs is permissible where arresting officers have reasonable suspicion that "the area to be swept harbors an individual posing a danger *to those on the arrest scene.*") (emphasis added); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (upholding search of passenger compartment of motor vehicle for weapons during a lawful investigatory stop of the occupant of the vehicle for "the protection of police and others").

on police misuse of their investigatory authority.[17] In doing so, the *Terry* decision struck a reasonable balance between safety concerns and personal privacy. Investigating officers need not turn a blind eye, nor unreasonably subject themselves (or the public), to risks to their personal safety in performing their duties, provided they have reasonable suspicion to conduct the limited searches permitted under *Terry*. As the next section explains, the balance tips in favor of such searches when officers receive sufficiently credible information, albeit obtained from an anonymous source, that a juvenile unlawfully possesses a firearm in a public place.

B. The Unique Dangers Posed By Firearm Possession, Especially By Juveniles, Favor The Use of Investigatory Searches Based On Anonymous Tips

In *Terry*, the justification, or "reasonable suspicion," for the stop and the ensuing pat down for weapons was based solely on the policeman's observations. 392 U.S. at 28. More recently, this Court held in *Alabama v. White*, 496 U.S. 325 (1990), that an anonymous (but substantially corroborated) tip to police concerning an individual alleged to be in possession of cocaine provided an adequate basis to justify the officer's investigatory stop of the individual's vehicle. *Id.* at 332. Importantly, the information corroborated by the officers in *White* was not, in and of itself, incriminating or suspicious. Rather, the officers confirmed merely that a women fitting a certain description left her apartment complex and traveled to a particular hotel as the tipster predicted. Notwithstanding the otherwise innocuous nature of the behavior the police observed in *White*, this Court held that the officers were permitted to make the inference that, if the tipster was sufficiently informed about the suspect's itinerary to be able to predict her travels, the tipster was "likely to also have access to reliable information about the individual's

17. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (holding that police officer "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*" when he "continued [his] exploration of respondent's pocket after having concluded that it contained no weapon. . . .").

illegal activities." *Id.* The tip, corroborated in its "innocent" details, was deemed sufficiently reliable to justify an investigatory stop and detention of the suspect.

The question squarely presented by the instant case is whether an anonymous tip that a juvenile fitting a particular description is at a specified location and is carrying a firearm, when coupled with police verification of the description and location of the individual, can similarly justify a "stop and frisk" of the juvenile for weapons. Although the tip in question lacks the degree of predictive qualities relied upon in *White*, several United States Courts of Appeals have held that a tipster's ability to predict the suspect's future actions is not essential to establishing the reliability of the tip.[18]

For example, in *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981), two police officers approached and frisked a man whose description fit the particulars of an anonymous tip that a black man wearing jeans, a black coat, and a black hat was carrying a sawed-off shotgun concealed in a black briefcase. *Id.* at 501. In upholding the officers' decision to frisk[19] the

18. *See, e.g., United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994) ("[t]here is nothing in *White* that precludes police from acting on an anonymous tip when the information to be corroborated refers to present rather than future actions."); *United States v. Clipper*, 973 F.2d 944, 949 (D.C. Cir. 1992) ("*Alabama v. White* does not establish a categorical rule conditioning a *Terry* stop (when police are acting on an anonymous tip) on the corroboration of predictive information."); *see also United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996); *United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995).

19. The court in *McClinnhan* actually went further and upheld not only the frisk but also the warrantless search of the suspect's briefcase (which contained the loaded shotgun) under the "exigent circumstances" doctrine. 660 F.2d at 503. In doing so, the court observed:

> We are aware that, in countenancing a warrantless search incident to an investigative stop, we are near the limits of the exigent circumstances exception. But we think we are well within it. . . . *We are not upholding today a warrantless search for anything other than an immediately-accessible*

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suspect based on nothing more than the tip and the officers' verification of the suspect's description, the D.C. Circuit observed:

> We think that Officers Bryant and Bement were confronted with the same unappealing choice [as in *Terry*]. Either they stopped McClinnhan on the basis of the tip as corroborated by their observation or they could at best follow him through the streets of Washington hoping he would commit a crime, or at least brandish the weapon, out of doors, rather than walking inside a dwelling, and thus beyond police purview, before putting the shotgun to its intended use. Either they ignored their reasonable suspicion or they took some action. We think that where their suspicion has some objective foundation, the Fourth Amendment does not, particularly where the reported contraband is a weapon as lethal as a sawed-off shotgun, require a police officer to ignore his well-founded doubts and accordingly will permit an investigative detention.

Id. at 502-03. Thus, the D.C. Circuit concluded that, when police officers corroborate "every significant detail" of the anonymous tip except the actual possession of a firearm, they should not be subjected to the risk that the suspect may have immediate access to the weapon. *Id.*

Eleven years later, the D.C. Circuit reconfirmed this holding in *United States v. Clipper*, 973 F.2d 944, 949 (D.C. Cir. 1992), which made the common sense distinction between tips involving guns (which are inherently dangerous) and tips involving illegal drugs (which are not necessarily so). In upholding the anonymous tip search, the court noted the intrinsically perilous nature of investigating tips regarding weapons.

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> *dangerous weapon* which, because of its nature as earlier reported to the police, could under no circumstances have a legal existence.

Id. at 505 (emphasis added).

> This element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in "controlled buys." Where guns are involved, however, there is the risk that an attempt to "wait out" the suspect might have fatal consequences. Here, as in *McClinnhan*, the police received an anonymous tip providing a detailed description of the appearance, clothing, and location of a man who reportedly possessed a weapon. Officers at the scene were able to corroborate all of the innocent details of the tip. In these circumstances, we conclude that a reasonable trier of the facts could find that the officers had a reasonable suspicion sufficient to justify a Terry stop and search.

Id. at 951. The court also noted that all but one of the state court decisions upon which the defendant relied "were concerned with drugs, not guns." *Id.* at 949. In short, the potential presence of weapons, particularly firearms, transformed the anonymous tip into one that the police authorities could not ignore.

The Eleventh Circuit Court of Appeals reached a similar conclusion. In *Gibson*, two officers acted quickly on an anonymous tip that provided descriptions of two individuals in a bar who were believed to be armed. 64 F.3d at 619. The police searched Gibson, who had an ammunition clip and a firearm and was charged with one count of possession of a firearm by a felon.

In affirming Gibson's conviction, the Eleventh Circuit held the anonymous tip (which turned out to be from the bar's manager) sufficiently reliable to support the officers' actions notwithstanding the absence of any predictive information in the tip. The details of the tip, that the potentially armed men were of a specified race and wore certain clothing (a long black trench coat), were "innocent" in the sense that they were not

themselves indicators of illegal conduct. The court held that once these details "were corroborated they added credibility to the anonymous tip." *Id.* at 623. Moreover, the tip was "hot" and acted upon expeditiously by the police officers.

> The officers also reached the bar no more than two and a half minutes after the call was received. The timing of their arrival ensured that the reported information was still fresh, increasing the chance that the officers would confront the potentially armed individual before any violence broke out, while also reducing the possibility that the officers would mistakenly detain the wrong person. Thus, we agree with both *Clipper* and *Bold* that *White* does not prevent law enforcement officers from relying and acting on anonymous tips when the information to be corroborated does not refer to future actions but instead details present circumstances.

Id. at 622-23. In addition, the Eleventh Circuit emphasized the public safety concerns that justify a pat down search when weapons may be present.

> Law enforcement officers are at greatest risk when dealing with potentially armed individuals because they are the first to confront this perilous and unpredictable situation. *A law enforcement officer "responding to a tip involving guns may take those hazards into consideration when balancing the suspect's interests against the 'need for law enforcement officers to protect themselves and other prospective victims of violence[.]'"*

Id. at 624 (emphasis added; footnote omitted). The effect of *Gibson* was to enable police officers in Florida to conduct limited *Terry* searches based upon anonymous, but verified, tips that included timely and accurate descriptions and public locations of persons believed to be armed.

The effect of *J.L.*, however, has been to create an untenable situation for law enforcement officers in Florida. A *Terry* search

based on an "anonymous tip" of a concealed weapon's violation is permissible under *Gibson* but is unconstitutional under the Florida Supreme Court's decision in *J.L.* A person charged with state and federal crimes arising from the same search would be released by a Florida state court but be subject to prosecution in a Florida federal court. For instance, if Gibson had been charged under Florida law as a felon who illegally possessed a firearm in the Miami bar, the search would have been illegal under *J.L.* and he would be released.

Of note, Chief Judge Richard Posner wrote the decision in *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996), which upheld the conviction of a felon who was charged with possessing a handgun. The anonymous tip was that "a black man wearing a tan shirt and tan shorts" had a gun in his waistband at a specified street corner in Decatur, Illinois (possession of a concealed weapon is illegal in Illinois). *Id.* at 885. Judge Posner surveyed the extant cases, including the *Gibson* decision, and concluded that:

> if the tip, though only weakly corroborated in the sense just explained, is that a person is armed, the police are entitled to stop the person and search him for the gun. *Armed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that a person is armed, and as a realistic matter this will require a stop in all cases.* For suppose DeBerry had made no threatening gesture but had simply denied in answer to the officer's question that he had a gun. Could the officer have left it at that? Or should he have asked for consent to frisk DeBerry and if DeBerry refused, insisted? The answers implicitly given by the cases we have cited are "no" and "yes," respectively. We think these answers strike the proper balance between the right of the people to be let alone and their right to be protected from armed predators.

Id. at 886. Judge Posner's pragmatic approach reflects the sensible point that police officers cannot simply ignore such tips, which are inherently dangerous to investigate.

The essential point in these decisions and others[20] is that, while anonymous "innocent information" tips with lesser predictive qualities may be less reliable (i.e., lower P), the potential danger to society (i.e., the L) is sufficiently grave to warrant a minimally intrusive search (low B) when the police receive specific, believable information that an individual is concealing a weapon illegally. Under these circumstances, the significantly greater L justifies reliance on a lesser showing of P. The likelihood of greater L under the circumstances just described is more than simply intuitive or hypothetical, particularly in the case of armed juveniles. As the next section discusses, statistics show that juvenile violence (particularly with firearms) has been increasing over recent years and is one of the most serious problems confronting the nation. Under these circumstances, this Court could easily conclude that the greater danger associated with juveniles and guns justified the *Terry* search below.

C. Harm To Society From Juvenile Firearm Possession And Use Is Increasingly A Social Cost That Weighs Heavily In Favor Of Limited Investigatory Searches

Statistics and studies support the proposition that guns, youth, and violence are a volatile mix that creates imminent danger. As the dissenting judges pointed out below, statistics show that violent crime committed by juveniles continues to rise. Federal Bureau of Investigations statistics presented to the

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20. *See Bold*, 19 F.3d at 104 ("[w]here the tip concerns an individual with a gun, the totality-of-the-circumstances test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for a prompt investigation."). A number of state supreme courts and state courts of appeal permit searches under these circumstances. *See J.L. v. State*, 727 So. 2d at 212 (Overton, J., dissenting) (collecting numerous cases; noting that only one decision nationwide supported the majority's position).

House of Representatives in 1998 show that from 1970 through 1992, the number of juveniles charged with murder increased 104%.[21] Additionally, the number of juveniles arrested on weapons offenses has more than doubled over the past ten years.[22] Also, from 1965 through 1992, the number of twelve-year-olds arrested for violent crime rose 211%, while the number of thirteen and fourteen-year-olds and the number of fifteen-year-olds arrested for violent crimes rose by 301% and 297% respectively, according to FBI statistics.[23]

Additional scholarly research points to the rise and severity of violent crimes, particularly among youth. For example, one article documents the obvious "explosiveness" that occurs when more juveniles get their hands on guns, particularly when compared to the adult population.[24] Juvenile offenders are now being identified as a "high-risk and high-usage" group for firearms, and "youth homicide cases where guns were the lethal weapon have increased dramatically."[25] All of this data points to the need for a "special policy focus" on preventing juveniles from obtaining the weapons that are used to kill citizens at an ever-increasing rate.[26]

The data is overwhelming. Between 1985 and 1992, the number of homicides involving firearm use doubled, with a 160% increase in gun killings.[27] All of this points not only to an increase in gun possession and use by juveniles, but to a higher likelihood of use once juveniles possess weapons compared to adults.[28] The higher willingness of juveniles to use guns once

21. *J.L.*, 727 So. 2d 212, n.8 (Overton, J., dissenting) (citing 144 Cong. Rec. H226-27 (Feb. 3, 1998)).

22. *Id.*

23. *Id.*

24. Franklin Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 LAW & CONTEMP. PROBS. 25, 25 (1996).

25. *Id.*

26. *Id.* at 37.

27. *Id.* at 28-29.

28. *Id.* at 29-30 (noting that 78% of homicides by juveniles in 1992 involved guns, up 32% from 1984, compared to 69% for all other ages, up only 15%).

they possess them leads to the conclusion that "[i]mmaturity justifies restriction of firearms access both because kids need to be protected from the consequences of their own bad judgments and because other people need to be protected from armed and dangerous teens."[29] In other words, a special focus is necessary when guns and youth are at issue.

Confirming the views of the dissenting justices in *J.L.*, scholars have noted that in "recent years, the use and deadly consequences of gun violence among adolescents has reached epidemic proportions."[30] In fact, although overall homicide rates are declining, firearm deaths among teenagers are nonetheless continuing to rise.[31] This statistic is especially alarming because when potentially violent crimes such as robbery take place, adolescents have a tendency to escalate into violence more quickly due to their more limited reasoning ability.[32] Furthermore, studies show that 39% of surveyed youths reported knowing someone who was either shot or killed by a handgun, and over 50% reported being able to get a handgun if so desired.[33] In other words, "guns were a significant part of their everyday social ecology."[34] Moreover, thresholds may have been lowered for the use of weapons to resolve youth disputes, such that gun use has become "a central part of status and identity formation within the 'street-oriented' world of the inner city."[35]

All of these studies are supported by the National Center for Juvenile Justice's recent report, which notes that while juvenile homicides were the lowest in a decade in 1997, they were still 21% above the average in the 1980s, and *all of the increase in homicides by juveniles between the mid-1980s and*

29. *Id.* at 36.

30. Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55 (1996).

31. *Id.*

32. *Id.* at 71.

33. *Id.* at 73.

34. *Id.*

35. *Id.* at 77-78.

mid-1990s was firearm related.[36] By 1994, 82% of all youth homicides involved guns.[37] Even more telling, the Report states that one in five juvenile arrestees reported carrying a gun all or most of the time.[38] This fact is supported by the 1996 report of the Bureau of Alcohol, Tobacco and Firearms, which states that almost half of all "crime guns" recovered (i.e., guns used in crime, illegally possessed, or suspected to have been used in a crime) were from individuals under the age of 25.[39] In short, young people are continuing to possess and use guns at an alarming rate that is much higher than the adult rate.

These studies and statistics provide strong support for the position of the dissenting justices in *J.L.* As Justice Overton stated, the "possession without authority of a concealed firearm by any individual in a public place is a prescription for disaster, but the possession of a firearm by a child is an especially dangerous and explosive situation." 727 So. 2d at 211 (Overton, J., dissenting).[40] Certainly, this potentially "explosive" situation heightens society's interest in public safety and tips the balance in favor of a minimal intrusion on the juvenile's privacy interest.

As Justice Overton cautioned in his dissent in *J.L.*, the "unfortunate reality of today's society is that dangerous persons of all ages stand armed and ready to shoot law enforcement officers and citizens." *Id.* His dissent was issued in late 1998, months before still more tragic incidents that took innocent lives at Columbine High School and elsewhere. He also presciently

36. JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 53-54 (1999).

37. *Id.* at 54.

38. *Id.* at 69.

39. *Id.*

40. In addition to being inherently dangerous, in Florida the public possession of a firearm by a juvenile under the age of sixteen is illegal. *See* § 790.22, Fla. Stat. (1997). The only exceptions are when the minor is hunting or participating in legitimate marksmanship activities under the supervision of an adult. *See id.* § 790.22(3). Neither of these situations appear to apply to possession of a firearm at a bus stop in front of a pawnshop in South Florida.

noted that "[u]ndoubtedly, by the time this opinion is published, the list of cites where schoolyard homicides have occurred will have grown." *Id.* at 212, n. 9 (Overton, J., dissenting) (listing the many places where school shootings had occurred as of late 1998). This ominous sentiment is grounded in the reality of juvenile arrests, studies of violent crime, and the numerous news reports of incidents involving gun violence from Littleton, Colorado, to Paducah, Kentucky, to Honolulu, Hawaii. The empirical data and the anecdotal evidence both show the need for greater weight on public safety, particularly when juveniles and gun violence are involved.

D. The *J.L.* Decision Has Undermined The Maintenance Of Order And Worked Mischief Among Florida's Appellate Courts

Finally, the impact of the Florida Supreme Court's majority opinion in *J.L.* has been to undermine the maintenance of order in society and to increase the likelihood and magnitude of harm to innocent persons. Since the opinion's release in December 1998, Florida's intermediate appellate courts have applied its holding (at times reluctantly) in six decisions, all of which resulted in the suppression of evidence and release of the defendants.[41] The natural and predictable result of the majority opinion in *J.L.* has been to render law enforcement less effective in its efforts to protect the citizenry of Florida from potentially dangerous situations and has, no doubt, had a demoralizing effect on law enforcement officers charged with following *J.L.*'s dictates. Law enforcement officers must now choose between waiting and hoping a suspect demonstrates "some observable suspicious conduct" that will allow them to act on the tip and putting their lives on the line by initiating a perilous "consensual

41. *Woodson v. State*, 1999 WL 682608 (Fla. 2d DCA 1999); *Maynard v. State*, 742 So. 2d 315 (Fla. 2d DCA 1999); *Johnson v. State*, 741 So. 2d 1223 (Fla. 2d DCA 1999); *Travers v. State*, 739 So. 2d 1262 (Fla. 2d DCA 1999); *Williams v. State*, 738 So. 2d 960 (Fla. 2d DCA 1999); *R.A. v. State*, 725 So. 2d 1240 (Fla. 3d DCA 1999).

encounter" with the potentially armed suspect.[42] Moreover, as discussed below, the decision has created mischief among lower Florida courts that have construed it so broadly to preclude wholly reasonable searches in other contexts.

The recent case of *Maynard v. State*, 742 So. 2d 315 (Fla. 2d DCA 1999) is an excellent example of how the decision in *J.L.* has tipped the balance too far against legitimate law enforcement needs to the detriment of the public. In that case, Florida's Second District Court of Appeal reversed a conviction of the 19-year-old defendant because the officer's justification for conducting a quick *Terry* stop was based on an "anonymous" tip originating from the suspect's own mother.

The tip in question was received by a police dispatcher in the early morning from a woman claiming to be the suspect's mother. She related that her son was carrying a firearm in his backpack, which she described as a "Mac-10 Uzi machine gun." *Id.* at 316. She said that her son had just left a specific address and was walking toward a nearby street. She described her son

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42. Justice Harlan's concurrence in *Terry* shows the impractical nature of requiring a consensual encounter between police and persons suspected of having a firearm.

> Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. *There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.*

392 U.S. at 33 (emphasis added). In contrast, the majority in *J.L.* stated that "there was nothing to prevent the police from engaging in a consensual encounter with the trio or from engaging in questioning them concerning their possession of a weapon as reported in the anonymous tip." 727 So. 2d at 208. It is respectfully suggested that the "Does anyone here have a gun?" approach is unwise and can expose law enforcement officers to the very risks that Justice Harlan and this Court in *Terry* concluded they should not have to face.

as "a white male, nineteen years of age, wearing a black and white shirt and black pants, and carrying a green backpack." *Id.* A BOLO was issued and an officer in the area immediately headed to the intersection that was provided in the tip. The defendant, who fit the description, was stopped and "patted down" as a safety precaution. *Id.* The investigatory search resulted in the recovery of a 9mm machine gun in the son's backpack.

Relying on *J.L.*, the appellate court overturned the son's conviction. *Id.* at 318. Incredibly, the court held that an "anonymous" tip, even from a person who claims to be the suspect's mother, is no more credible than any other "anonymous" tip even if all of the detailed information provided concerning the suspect is verified. *Id.* at 317. The court considered the tip to be anonymous in nature rather than one from a "citizen-informant" because the police failed to confirm the identity of the tipster either through "modern police communications centers" that "immediately know the address of an incoming telephone call" or by driving to the address where the call originated. That left police officers with the option to engage "in a consensual encounter with the suspect" in the hope of gaining additional information to "justify a search." *Id.* at 318.[43] The latter approach, of course, if fraught with obvious peril.

The mischief of *J.L.* is apparent. In *Maynard*, it thwarted police officers in their valid efforts to prevent crimes and placed the rights of a heavily-armed nineteen year-old perpetrator above the legitimate safety concerns of the community. The irony is that the tip was from the suspect's own mother. Thus, the rule of *J.L.* thwarted the legitimate efforts *of a parent* to protect society and her son from the evils stemming from illegal possession of a machine gun. The inability to conduct a minimal

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43. The *Maynard* decision suggests that these activities could have been performed simultaneously by separate police officers, but that assumes sufficient available manpower by the law enforcement agency in question at the exact time the anonymous tip is received.

"stop and frisk" search operated to the obvious detriment of society. Barring an instant verification of the mother's identity, the police officer was forced to choose between losing track of the suspect and initiating a risky "consensual" encounter with a teenager accused of packing a machine gun. The unreasonableness of this result is apparent.

Similar to *Maynard* is the Second District's decision in *Woodson v. State*, 1999 WL 682608 (Fla. 2nd DCA 1999). The appellate court reversed a concealed weapons charge despite the police having a detailed description of the suspect and actually seeing a bulge in his pocket. The information was provided by an individual who approached police and identified himself as "Frank." The individual provided a detailed description of the suspect's clothing, his hairstyle, and the location of his handgun. The officers approached the suspect in a public store and confirmed every aspect of the anonymous tip (except the tipster's identity) including personally viewing a bulge in the suspect's pocket (where the tipster said it was located). The Second District, however, reversed the defendant's conviction and directed his release. The court held that the officers' *Terry* stop was unlawful without independent investigation of the tip. The fact that the "anonymous" tipster was an individual who voluntarily approached police officers, identified himself, and provided detailed and verified information about the suspect and the location of the firearm apparently was of no moment.

Yet another low point in the application of *J.L.* is the Second District's holding in *Travers v. State*, 739 So. 2d 1262 (Fla. 2nd DCA 1999). In *Travers*, the court reversed a conviction even though it was the defendant himself who provided the anonymous tip. During the course of a "chatroom" conversation on the Internet, a police detective set up a meeting with another participant for the purpose engaging in illegal activity. *Id.* at 1263. The actual identity of the participant was not known at that time. The meeting was set at 7:45 p.m. that same night at a local church parking lot. The participant identified himself as a 26 year-old male

with brown hair whose vehicle was a black Ford Taurus. That evening, the detective positioned himself across from the church. At 7:45 p.m., he saw a blue Buick Skylark pull into the church parking lot where other vehicles were parked. The vehicle slowly circled the lot and left. It came back five minutes later, entered the lot, and slowly circled again. After the car exited the lot, the detective pulled up behind it and "observed the driver to be a white male with brown hair who appeared to be in his late 20s or early 30s." *Id.* at 1263. The driver of the car pulled into a gas station where he was interviewed and later arrested.

On appeal, the defendant claimed that the police did not have grounds for the investigatory stop based on the substantially corroborated information. The appellate court agreed and held that the "chatroom" conversation was "best analogized to the anonymous tips cases." *Id.* at 1263. In doing so, the court held that the conversation with the then-unidentified individual in the chatroom was not a reliable source of information under the rationale of *J.L.* The court, however, wrongly applied the label "anonymous tip" to a situation that is far afield from other "anonymous tip" cases. Here, the "anonymous tip" did not come from a third party (as is almost universally the case); instead, it came from the very person who sought to meet the police detective to engage in crimes.

In addition, the predictive content of the tip was substantial. An uninformed "anonymous" source would not have "inside information" regarding the suspect's Internet communication with the police detective earlier that day. Theoretically, the communication could have been with an individual who was able to predict that the suspect (who matched the description given) would be driving through the particular church parking lot at precisely 7:45pm in a somewhat suspicious manner (i.e., circling slowly twice). The likelihood of such prescience, however, is remote. Instead, the appellate court should have considered that the "anonymous" communication at issue resulted in the scheduling of a meeting that — later that evening — confirmed the reliability of the earlier communication.

The point of *Travers* is that *J.L.* has spawned decisions that undermine investigatory searches in both traditional "anonymous tip" situations as well as others. The irony of *Travers* is that the defendant was deemed an unreliable source of information regarding his own future whereabouts. Under the circumstances, the officer was justified in making a brief investigatory detention of the suspect who matched the description given and who appeared at the precise place and time that had been pre-arranged with the law enforcement officer. Instead, the court inexplicably ruled that the defendant's own description of himself coupled with the suspicious activity observed by the police officer was insufficient to warrant an investigatory detention and investigation.[44]

Perhaps the most egregious application of *J.L.* occurred in the case of *R.A. v. State*, 725 So. 2d 1240 (Fla. 3rd DCA 1999). In that case, Florida's Third District Court of Appeal reversed the conviction of a juvenile based on *J.L.*, even though it was plainly obvious to the police officer that the anonymous tip was corroborated and a potential crime was in progress. In that case, the officer spotted several teenagers a very short distance from an elementary school that an anonymous tipster reported was being robbed at about 1:30 in the morning. Upon spotting the youngsters at the early hour at a dead-end road very close to the school, the officer proceeded to conduct a *Terry* pat-down, resulting in evidence that the defendant had been involved in the theft and trespass. Nonetheless, the appellate court reversed the juvenile's conviction because the officer did not independently substantiate the anonymous tip, even though he had spotted the youths on a deserted road near the school just minutes after the reported robbery had occurred. The result

44. *See also Johnson v. State*, 741 So. 2d 1223, 1224 (Fla. 2nd DCA 1999) (drug possession conviction reversed because officer did not have reasonable suspicion for *Terry* stop, even though officer had detailed description of suspect that was corroborated). In *Williams v. State*, 738 So. 2d 960 (Fla. 2nd DCA 1999), the only other decision to apply *J.L.*, the State conceded there was no reasonable suspicion as the tip apparently was not corroborated at all.

overlooks common sense and applies the rigid rule laid out in *J.L.* in a way that stymies legitimate law enforcement efforts. *Id.* at 1243 (Schwartz, C.J., dissenting).

These cases demonstrate that the majority opinion in *J.L.* has led to a reduction in the ability of police to maintain order in society and, at the margin, placed the lives of officers and the general public at greater risk. Under *J.L.* and its progeny in Florida, officers must dawdle until they get "additional information" — if any, if ever — to engage in a weapon's check thereby allowing suspects to remain unchecked and to flee. As a result, society is at risk even when all indicators, including a level of common sense, point to a justifiable basis for a brief investigatory detention to avoid harm. Yet, as the foregoing cases demonstrate, the *J.L.* decision has had the perverse effect of actually *raising the bar* above the normal reasonable suspicion standard that traditionally has been applied to investigatory stops. On balance, the Fourth Amendment does not require that the public be subject to the increased danger of potentially violent, gun-toting youths where an immediate and minimally intrusive "stop and frisk" is based on an accurate albeit anonymous tip. This Court should reverse the Florida Supreme Court's decision and restore the balance established in *Terry*.

CONCLUSION

The Justice Coalition respectfully suggests that the Florida Supreme Court's analysis is faulty because it fails to consider the dire social losses that arise from the possession of weapons by juveniles. Under a cost/benefits approach, a "stop and frisk" search was reasonable under the circumstances to prevent potential harm to innocent victims. The minimally intrusive "stop and frisk" search was justified because the tip, albeit anonymous, was accurate and, more importantly, the search averted the potentially devastating social losses that arise (all to frequently) from juvenile possession of handguns. The Justice Coalition values individual freedoms, including the right to be free from unwarranted governmental intrusions. The individual freedom to exercise this liberty, however, is not an absolute trump card and must be tempered by the state's interest that its citizens be free from social disorder and its consequences. Here, a proper balancing of society's interest in public safety against the invasion of the privacy interest of the juvenile suggests that the police officers' decision to conduct a *Terry*-type search of J.L. upon confirmation of the details of the anonymous tip was warranted under the circumstances presented.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

— v. —

J.L.,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE FLORIDA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, THE CRIMINAL JUSTICE POLICY FOUNDATION, THE JUVENILE LAW CENTER, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE SOUTHERN POVERTY LAW CENTER, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The ACLU of Florida is one of its statewide affiliates. The Criminal Justice Policy Foundation, an educational, non-profit organization, established in 1989, promotes innovative solutions to criminal justice problems. The Juvenile Law Center is a national children's rights organization dedicated to advancing and protecting the rights of children in society, including in the juvenile and criminal justice systems. The National Legal Aid and Defender Association is an organization of several hundred public defender and legal services agencies. The Southern Poverty Law Center is a nonprofit organization supported by thousands of donors from across the country. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of justice, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

During daylight hours in Miami, Florida, an anonymous person informed the police that several young black males were standing at a bus stop. The unknown tipster

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

described the young men and asserted that the one wearing a "plaid-looking" shirt was carrying a gun. Shortly after the tip was received, two officers arrived at the specified bus stop where they observed three black males. The officers did not see any of the three engage in suspicious behavior, and nothing else about the situation engendered any suspicion. One of the three young men, respondent J.L., was wearing a plaid shirt. One of the officers immediately approached J.L., ordered him to put his hands above his head, and frisked him. The officer found a gun in J.L.'s pocket. At the same time, the second officer frisked both of J.L.'s companions even though the tipster had not accused them of any wrongdoing.

The state filed a juvenile delinquency petition against J.L., charging him with unlawful carrying of a concealed firearm and unlawful possession of a firearm by a person under 18 years of age. After the trial judge granted J.L.'s motion to suppress the gun, the government appealed. The Florida Court of Appeal reversed the suppression order, concluding that the officer's conduct was based on a reasonable suspicion that J.L. was carrying a concealed weapon. *State v. J.L.*, 689 So.2d 1116 (Fla. Dist. Ct. App. 1997). J.L. appealed the decision to the Florida Supreme Court. The Court agreed with J.L.'s contention that his Fourth Amendment rights had been violated. A majority held that the facts known to the officers did not give rise to a "reasonable suspicion." *J.L. v. State*, 727 So.2d 204, 209 (Fla. 1998). Moreover, the majority refused to recognize a "firearm or weapons exception" to the reasonable suspicion requirement. *Id.*

The state of Florida petitioned this Court for a writ of *certiorari* to the Florida Supreme Court. On November 1, 1999, this Court granted the writ.

SUMMARY OF ARGUMENT

All considerations relevant to Fourth Amendment analysis dictate the conclusion that the stop and frisk in this case violated respondent's constitutional right to be secure against unreasonable searches and seizures. First, common law authorities provide no support for the contention that a stop and a frisk based on an unsubstantiated, anonymous tip are reasonable. History suggests that the Framers of the Constitution would not have approved of a practice that entails the same risks of arbitrariness that prompted them to outlaw general warrants. In addition, the message of the controlling precedents is unmistakable–stops and frisks based on unreliable, uncorroborated, anonymous tips are unreasonable. *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny demand an individualized, reasonable suspicion of criminal activity and danger. *Alabama v. White*, 496 U.S. 325 (1990), holds that when an anonymous tip is the basis for official action, the Constitution requires significant corroboration indicative of a reliable basis of knowledge and veracity. Because it included no such corroboration, the record here did not establish a reasonable suspicion.

A balancing of the severe intrusions occasioned by a stop and frisk against the limited extent to which official reliance on unsubstantiated, anonymous tips promotes the important government interest in detecting firearm possession also militates strongly against the reasonableness of the stop and frisk in this case. Stops and frisks are undeniably serious deprivations of sacred constitutional liberties. An unreliable, anonymous tip generates too small a likelihood that an individual is in possession of a weapon to counterbalance those deprivations. Stops and frisks on such insubstantial bases deprive innumerable innocent citizens of fundamental freedoms.

A "firearms exception" to the reasonable suspicion requirement is both legally and factually indefensible. First, the *abstract* interest in preventing dangerous firearm possession cannot offset the *concrete* intrusions caused by a stop and frisk. Second, and most important, enduring constitutional liberties may not be suspended or diluted on the basis of changes in crime rates or firearm use. Third, current rates of violent crime and firearm use belie claims of an escalating public safety crisis. Finally, a "firearms *exception*" to the "reasonable suspicion *exception*" to the textual probable cause norm is inconsistent with *Terry* and its progeny, and can only lead to the evisceration of a vital Fourth Amendment safeguard–the individualized suspicion demand.

Stops and frisks based on unreliable, uncorroborated, anonymous tips are also unreasonable because they threaten important Fourth Amendment principles. A central premise of Fourth Amendment jurisprudence is the necessity of neutral judicial review. If officers can justify their actions on so insubstantial a showing, this vital safeguard would be meaningless. In addition, several strands of Fourth Amendment doctrine evince a concern with preventing and discouraging official fabrication. A holding that officers may stop and frisk on tips such as the one in this case is an invitation to falsify. Finally, Fourth Amendment doctrine does and should provide some shelter against discriminatory law enforcement. The authority to act on unsubstantiated, anonymous tips creates excessive risks of unacceptable discrimination.

ARGUMENT

I. NEITHER HISTORY NOR THE CONTROLLING PRECEDENTS SUPPORT THE CONCLUSION THAT THE STOP AND FRISK OF J.L. WERE REASONABLE

A. The Common Law Provided No Authority to Stop And Frisk On The Basis Of An Unreliable, Uncorroborated, Anonymous Tip

In determining whether a governmental action violates the Fourth Amendment, the initial inquiry is whether that action "was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 119 S.Ct. 1297, 1300 (1999). There is no evidence that the common law would have deemed a stop and frisk based on an unsubstantiated, anonymous tip to be reasonable.

"'No right [was] held more sacred, or [was] more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968)(*quoting Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). The authority to infringe upon this valued right by detaining a *suspicious* person can find some common law support. *Minnesota v. Dickerson*, 508 U.S. 366, 380-81 (1993)(Scalia, J., concurring). However, "there appears to be *no clear support at common law* for physically searching [a] suspect," on less than probable cause. *Id* at 381 (emphasis added); *see also* Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 324 (1942)("At common law . . . a watchman . . . had no right to search before arrest."). Clearly, then, there

is no common law support for a stop and frisk based on nothing more substantial than an unreliable, anonymous tip that does not give rise to a reasonable suspicion. The "sacred" nature of the right to "possession and control of [one's] person" and the absence of "authority of law" for a stop and frisk such as the one at issue here suggest that the common law would have considered them unreasonable.[2]

B. According to the Court's Precedents, An Unreliable, Uncorroborated, Anonymous Tip Cannot Furnish The Individualized, Reasonable Suspicion Required For A Stop And Frisk

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court decided that while a stop is a seizure and a frisk is a search, *id.* at 16, both can be reasonable on less than probable cause. *Id.* at 20-21, 24-27. The Court, however, pointedly rejected the argument that mere "suspicion" could support a stop and frisk. *See id.* at 21-22. Instead, because a "demand for specificity . . . is the central teaching of . . . Fourth Amendment jurisprudence," *id.* at 21 n.18, an officer must "be able to point to specific and articulable facts which . . . reasonably warrant [the] intrusion[s]" effected by a stop and frisk. *Id.* at 21. The facts, "judged against an objective standard," must be sufficient to "'warrant a man of reasonable caution in the belief'" that a stop and frisk is warranted. *Id.* at 21-22. Official authority to search and seize based on "subjective good faith," "inchoate or unparticularized suspicion," or "inarticulate hunches" would result in the "evaporation" of Fourth Amendment rights and would leave us "'secure in [our] persons, houses, papers, and effects,' only in the discretion of the police." *Id* at 22. Consequently, a stop and a frisk are constitutional only when an officer has information that "leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id.* at 30.[3]

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2. History provides additional reasons to condemn the stop and frisk in this case. Official abuses of the authority to search and seize were among the prominent causes of the American Revolution. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 51-78 (1937). Colonists deeply resented the general warrants used to invade their homes and seize their persons because general warrants granted virtually unfettered discretion to conduct searches and seizures without adequate cause. *See* 3 Jonathan Elliott, *Debates on The Federal Constitution* 588 (2d ed. 1891) (reporting speech of Patrick Henry at the Virginia ratifying convention). The Warrant Clause of the Fourth Amendment was specifically designed to forbid general warrants, to restrict discretion, and to ensure that searches and seizures would be based "upon probable cause."

Stops and frisks based on unreliable, uncorroborated, anonymous tips are similar to general warrants, and are equally objectionable, because they involve excessive discretion to deprive citizens of precious freedoms without sufficient reason. Our ancestors' intense hostility to unjustified searches and seizures would almost certainly have led them to disapprove of a stop and a frisk like those at issue in this case. Moreover, neither history nor the terms of the Fourth Amendment furnish any reason to believe that the Framers would have accepted the claim that special dangers posed by firearms can justify searches and seizures without the ordinarily required showings of cause. *See infra,* Part II. C. The searches and seizures that our forebearers rebelled against were motivated by what the government believed were serious concerns. *See* Lasson, *supra* at 67-78 (discussing the significance of writs of assistance to the Crown as a tool for enforcing important revenue-generating tax laws).

3. The dissent in the Florida Supreme Court accused the majority of losing sight of "the fact that the rationale of *Terry* . . . is to protect" officers and the public. *J.L. v. State*, 727 So.2d 204, 211 (Fla. 1998)(Overton, J., dissenting). Unfortunately, like many of the opinions it cites in support of a "firearms exception" to *Terry*, the dissent lost sight of the critical fact that the dangers posed by weapons led the *Terry* Court to hold that a frisk is permissible *only* "[w]hen an officer is *justified in*

(continued...)

In subsequent cases, the Court has labeled the requisite showing a "reasonable suspicion." *See Brown v. Texas*, 443 U.S. 47, 51 (1979). A reasonable suspicion of criminal activity is required for a detention, *id.*, while a reasonable suspicion that a detained person is armed and dangerous is needed to sustain a frisk. *Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). Consistently, the Court has mandated an individualized showing of articulable, objective facts that give rise to a sufficient likelihood that a particular stop and frisk will serve "society's legitimate interests" in crime prevention and community safety. *See Brown*, 443 U.S. at 51; *see also Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

Alabama v. White, 496 U.S. 325 (1990), makes it patently clear that the stop and the frisk in this case were not based on a reasonable suspicion that the respondent was involved in crime, was armed, or was dangerous. According to *White*, the value of an informant's report hinges upon two "highly relevant" factors–the informant's basis of knowledge and veracity. *Id.* at 328. Because a mere anonymous tip typically contains nothing to support either factor, alone it cannot justify a stop or frisk. *Id* at 329. To engender a reasonable suspicion, the tip must be corroborated.[4] Corroboration of "innocent" information can lead to reasonable suspicion, *but only if* it sufficiently supports the reliability of the tipster's source of information and the honesty of the

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3. (...continued)
believing that [an] individual . . . is armed and presently dangerous." *Terry*, 392 U.S. at 24 (emphasis added).

4. An inadequate tip could also be "supplemented" by additional information indicative of crime or danger. In such circumstances, the totality–the deficient tip "plus" the supplemental facts–could give rise to a reasonable suspicion. There was absolutely no "supplemental" information in the record in this case.

tipster. *Id.* at 332.

The minimum amount of corroboration necessary to satisfy the reasonable suspicion standard is illustrated by the Court's analysis in *White*–an anonymous tip case that was very "close" to the reasonable suspicion line. *Id.* at 332. In *White*, "independent corroboration . . . of *significant aspects* of the informer's *predictions* imparted some degree of reliability to the [critical] allegations" of the tipster. *Id.* at 332 (emphasis added). It was "important" that the facts that were corroborated included "a range of *details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted*." *Id.* at 332 (emphasis added). The unknown person's confirmed "ability to predict . . . future behavior" was "important" because it demonstrated inside information–that is, a reliable basis of knowledge. *Id.* at 332. Verification of "significant aspects of the [informant's] predictions" provided "reason to believe not only that the caller was honest but also that he was well [enough] informed . . . to justify the stop." *Id.* at 332.

White did not hold that the only way that the *inchoate* suspicion furnished by an anonymous tip can ripen into a *reasonable* suspicion is if predictions of future conduct are corroborated. It did hold, however, that if officers wish to rely on an accusation leveled by an anonymous source *alone*, they must have cognizable reasons to credit the reliability and honesty of the informant. *If* a tip contains "a range of details," *if* those details include "predictions of future behavior," and *if* those predictions are "corroborated," the informant's report of criminal activity will *just* clear the Fourth Amendment bar.

The tip in this case falls woefully short in every respect. It contained no detailed information, but merely

recounted the general facts that black males were standing at a bus stop and were wearing certain clothing and *concluded* that one of them had a gun. More important, the minimal information that was corroborated pertained to "condition[s] presumably existing at the time of the" tip. *Id.* at 332. "Anyone could have 'predicted'" those facts. *Id.* at 332. Confirmation of their accuracy provided precious little indication that the tipster had a reliable way of knowing about an illegal weapon or was telling the truth about the alleged weapon. If *White* was a close case, surely the facts of this case–a case devoid of all the "important" factors relied on in *White*–fall well short of establishing a reasonable suspicion.[5] Without "'[s]omething more,'"[6] a forcible stop and frisk were not justified.[7]

II. A BALANCING OF RELEVANT FOURTH AMENDMENT INTERESTS DICTATES THE CONCLUSION THAT THE STOP AND FRISK OF J.L. WERE UNREASONABLE

A. The Severe Intrusions Upon Liberty, Privacy, And Dignity Occasioned By Stops And Frisks Outweigh The Minimal Governmental Interests Advanced By Reliance on Unreliable, Uncorroborated, Anonymous Tips

The reasonableness of a search or seizure depends upon a balancing of the intrusion on the individual against the government interests served by the intrusion. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see also Brown v. Texas*, 443 U.S. 47, 50 (1979) . The balance in this case dictates the same conclusion that the common law and controlling precedents mandate–that the stop and the frisk of J.L. were unreasonable.

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5. The Florida Supreme Court's reasoning is entirely consistent with this Court's conclusions in *United States v. Sokolow*, 490 U.S. 1 (1989), that a totality of nonsuspicious facts can give rise to a reasonable suspicion, *see id.* at 9-10, and that an officer with reasonable suspicion need not pursue a "less intrusive" alternative than a *Terry* detention. *See id.* at 10-11. The Florida Court's concern with the absence of suspicious indicia in this case reflected the view that "something more" was needed before *this undetailed and minimally corroborated tip* could support a reasonable suspicion finding. Moreover, its suggestion that the officer had to pursue a less intrusive alternative in this case was based on the correct conclusion that there was *no reasonable suspicion* for a stop and frisk of J.L.

6. *Adams v. Williams*, 407 U.S. 143 (1972), is distinguishable. In *Adams*, the "hearsay" supported a reasonable suspicion because the informant was *present* at the scene of the stop and frisk and was *known* to the officer. The Court indicated that information from absent, anonymous tipsters would carry less weight. *Id.* at 146. The *Alabama v. White* majority observed that the requirement of "'[s]omething more'" for anonymous tips was consistent with the conclusion in *Adams* that some tips are so unreliable that they would warrant either "'no police response or require further investigation.'" *White*, 496 U.S. at 329 (quoting *Adams v Williams*, 407 U.S. at 147).

7. A pair of alternative scenarios reinforce this conclusion. If the officer who stopped and frisked J.L. had done so based on her own conclusion that he was in possession of a firearm or based on a fellow officer's assertion identical to that provided by the anonymous tipster, her actions would undoubtedly have been unreasonable. Like showings of probable cause, showings of reasonable suspicion must be based on objective, articulable *facts*. Judges may not defer to the barebones *conclusions* of officers, but instead must independently determine whether the articulated facts support a reasonable suspicion. *See Sokolow*, 490 U.S. at 10; *Illinois v. Gates*, 462 U.S. 213, 239 (1983). The tip in this case can support a reasonable suspicion finding *only if* an unknown tipster's assertions are considered more reliable and credible than equivalent assertions by a known police officer. Such a premise would be worse than "quixotic," *Gates*, 462 U.S. at 272 (White, J., concurring); it would be factually erroneous and legally misguided.

Terry recognized that stops and frisks intrude severely upon individuals' interests in personal liberty, privacy, and dignity. The *Terry* Court did not dwell upon the intrusiveness of detentions, but did "emphatically reject th[e] notion" that they were not Fourth Amendment "seizures." When an officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry*, 392 U.S. at 16, and only a "reasonable suspicion" of criminal activity can counterbalance the serious loss of liberty. *Id.* at 30.

The Court left no doubt about the severity of the intrusion entailed in a frisk. According to Chief Justice Warren, the suggestion that a public patdown is "a 'petty indignity'" is "simply fantastic." Instead, "[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Id.* at 16-17. It "constitutes a *severe . . . intrusion upon cherished personal security*, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25 (emphasis added).[8] Frisks are no less intrusive or offensive today than they were in 1968.

The magnitude of the countervailing government interest depends upon both the nature of that interest and a showing that the interest is present in a particular situation. *See Brown*, 443 U.S. at 50-51. The interests in securing an illegal firearm and in protecting officers and others from an armed, dangerous person are powerful and legitimate in nature. The gravity of those public interests explains the *Terry* Court's willingness to create a narrow exception to the textual probable cause requirement for protective frisks. Clearly, then, the interests claimed to be served by the stop and frisk in this case *could* outweigh the intrusion upon respondent's Fourth Amendment interests.

The problem, however, is that there was no showing that the officer's action would advance these important public interests to a sufficient degree. The unsubstantiated, anonymous tip did not establish a sufficient *likelihood* that a stop and frisk would promote public safety. A barebones tip with minimal corroboration falls well short of establishing a reasonable suspicion because it does not give rise to a constitutionally adequate *probability* that a search and seizure will promote the government's interests. The interests in this case–and others like it–are insufficiently weighty to outweigh the severe intrusions on personal freedom, privacy, and dignity

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8. The Court's detailed depiction of frisks, *see Terry*, 392 U.S. at 17 n.13, graphically reinforced the conclusion that frisks severely intrude upon constitutional interests that have traditionally been considered sacred and inviolable absent concrete, individualized showings of countervailing interests. Subsequent decisions only confirm that conclusion. A frisk is never permissible on less than a "reasonable suspicion" that a particular suspect is "armed and dangerous." *Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). Because the invasion is so severe, the Court has jealously confined the power to frisk to situations involving weapons. Officers must demonstrate *probable cause* before the strong societal interests in detecting contraband or evidence of violent crimes can outweigh such an intrusion. *See Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993); *see also Ybarra v. Illinois*, 444 U.S. 85, 94-96 (1979).

In *Dickerson*, the Court concluded that the privacy loss occasioned
(continued...)

8. (...continued)
by even a simple, manual manipulation of an object in a pocket requires probable cause to believe that the object is contraband. 508 U.S. at 378-79. And in *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991), the Court held that "the slightest application of physical force"–even "'merely touching, however slightly, the body of the'" suspect–is sufficient to effect a seizure. In the Court's view, physical intrusions upon the sanctity of persons clearly constitute serious infringements upon important constitutional liberties.

not because illegal firearm possession is a minor concern, but, rather, because there was inadequate reason to believe that that interest would be advanced.

B. Stops and Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Deprive Innumerable Innocent Citizens of Fundamental Constitutional Liberties

A primary reason that the Fourth Amendment prohibits stops and frisks based on hunches and unfounded suspicions and demands individualized, "reasonable suspicion" is to protect innocent citizens against the loss of invaluable liberties. *See Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Sokolow*, 490 U.S. 1, 11 (1989)(Marshall, J., dissenting). Stops and frisks based on less than reasonable suspicion are not unreasonable because they would *never* be productive. Even when the government's showing falls short of the minimum level of probability demanded by the Constitution, some stops and frisks will in fact detect criminal activity. The problem, however, is the high price of this modest productivity. For every stop and frisk that bears fruit, innumerable innocents will have to suffer losses of liberty, privacy, and dignity.[9]

Unreliable, anonymous tips pose particularly serious threats to the rights of innocents. By definition, an anonymous source's character and motivation are unknown. He may be an inveterate liar, mentally unstable, irrational, fearful, or prone to leap to conclusions based on insubstantial information. She

9. Even completely random searches and seizures–warrantless, causeless sweeps through all homes in a neighborhood, for example–will sometimes produce tangible results. They are forbidden in our free society, however, because the costs dramatically outweigh the benefits.

may be prompted by a grudge, engaged in a prank, or biased by racism. *See Alabama v. White*, 496 U.S. 325, 333 (1990)(Stevens, J., dissenting). Without affirmative reasons to believe that an informant is honest and has a good source of information, the chances that the person targeted by an accusation will be blameless are intolerably high. Corroboration of minimal details that "anyone could know" does nothing to diminish the risks. If officers are permitted to act on unreliable, uncorroborated, anonymous tips, mistaken intrusions upon innocent citizens will abound.[10]

"[A] very large category of presumably innocent [citizens] . . . would be subject to virtually random [searches and] seizures were the Court to conclude that as little foundation as there was in this case could justify a [search and] seizure." *Reid*, 448 U.S. at 441; *see also Maryland v. Wilson*, 519 U.S. 408, 415-22 (1997)(Stevens, J. dissenting). That is reason enough to conclude that the balance of interests tips decisively against the reasonableness of a stop and frisk in these circumstances.

C. Fourth Amendment Interest Balancing Does Not Support A "Firearms Exception" To The

10. Like probable cause, reasonable suspicion is a "common sense" concept. *See Sokolow*, 490 U.S. at 7-8. Any suggestion that anonymous informants are somehow inherently worthy of belief runs contrary to common sense. Surely, no *rational* investor would make important financial decisions wholly on the basis of "tips" comparable to the one in this case. The reason an investor would demand additional support is simple. The gains made from an occasional profitable investment would be dramatically offset by the losses incurred from misguided ventures. Investment in reliance on the tips would make sense only if there were good enough reasons to credit the tips. It is equally irrational to allow officers to base important constitutional decisions upon such tips unless there are good reasons to credit the tips.

Reasonable Suspicion Requirement

Courts that have upheld stops and frisks based on tips that are inadequate to establish a reasonable suspicion have effectively created a "firearms exception" to *Terry's* "reasonable suspicion exception" to the probable cause demand.[11] Interest balancing does not support that exception. Moreover, a firearms exception cannot be reconciled with the precedents and would threaten to eviscerate the vital demand for individualized, objective showings of reasonable suspicion.

The "firearms exception" to the reasonable suspicion requirement rests on the notion that the character of the societal interest in preventing illegal firearm possession is so critical it justifies intrusions on less than the normally required showing.[12] The "gravity" of the public concern with dangerous, illegal weapons is undeniable. The *abstract* importance of that interest alone, however, cannot counterbalance the *concrete* intrusions involved in stops and frisks. The Fourth Amendment scales tip only when the government's interest is also made concrete–*i.e.*, given cognizable weight–by a demonstration of individualized suspicion. No matter how significant the interest to be served, the constitutional balance favors individuals until the public's interest is shown to be real.

Some opinions suggest that an exception to the norm of sufficient individualized suspicion is justifiable because an escalating epidemic of illegal firearm possession and violence has resulted in a public safety crisis.[13] There are persuasive answers to this superficially attractive proposition.

First, and most important, the enduring protections of the Constitution may not be suspended simply because a particular type of crime or danger may have increased. The values embodied in the Fourth Amendment--privacy, liberty, and dignity–are immutable. The special character of these "bulwark[s] of our national liberty," *see United States v. Havens*, 446 U.S. 620, 634 (1980)(Brennan, J., dissenting), makes them immune to changes in the prevailing winds.

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less,

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11. Typically, the opinions do not use the "firearms exception" label. It is evident, however, from their reasoning, that they are willing to suspend the normal requirement of reasonable suspicion solely because the subject of a tip is a firearm. The result is a *de facto* "firearms exception" to the reasonable suspicion norm. *See, e.g., United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996); *United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994); *United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992).

12. *See DeBerry*, 76 F.3d at 886 ("Armed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that a person is armed, and as a realistic matter this will require a stop *in all cases*." (emphasis added)); *State v. Sharpless*, 715 A.2d 333, 338 (N.J. Super. Ct. App. Div. 1998)("[B]ecause of the imminent danger posed by firearms, an anonymous tip that a person is armed should be treated differently than a tip concerning other . . . criminal activity.")

13. *See, e.g., Bold*, 19 F.3d at 104; *Clipper*, 973 F.2d at 951; *State v. Hasenbank*, 425 A.2d 1330, 1334 (Me. 1981).

important.

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). To deny our most prized freedoms in times of crisis is to deny the very essence of our national character. The temptation to do so is understandable and powerful, but surrender to that temptation can only bring regret.[14] Consequently, a firearms exception to the reasonable suspicion requirement is legally indefensible.[15]

Even if a "firearms exception" could be reconciled with

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14. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); 50 U.S.C. App. §§ 1989, 1989a (1988)(congressional acknowledgment of and apology for fundamental injustice of internment of those with Japanese ancestry).

The responsibility for responding to public safety crises rests primarily in the hands of the political branches who have a variety of means to deal with the excess availability of firearms within the constraints imposed by the Constitution. Those who call for a "firearms exception" to the Fourth Amendment norm are essentially asking the courts to suspend fundamental liberties because they are unsatisfied with the measures taken and results achieved by the responsible branches. The courts should decline the request.

15. A recurrent refrain in opinions endorsing a "firearms exception" is that officers must have the authority to stop and frisk those who are the subjects of tips concerning firearms because failures to act could have dire consequences. *See, e.g., United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995); *State v. Pully*, 863 S.W.2d 29, 33-34 (Tenn. 1993). While this concern with the dangers posed by alternative courses of action is understandable, it reflects either a lack of appreciation for or a disagreement with the balance struck by the Fourth Amendment. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). The Framers of the Fourth Amendment understood that the price of freedom can be quite high, but made the decision to pay that price.

the Constitution, it could only be justified by a proven, compelling need for judicial intervention. The burden of proof falls on supporters of the exception. They have not carried their burden, nor could they do so, for the empirical evidence is to the contrary. All the statistical data compiled in recent years contradicts the claim that a spiraling epidemic of firearm violence threatens the stability of our nation and the well-being of our people. Rather than showing a burgeoning crisis, the studies published over the past several years document a consistent and dramatic downward trend in crime, violent crime, homicides, and firearm use.[16] Juvenile crime and violence rates have dropped even more steeply than the general crime rates.[17] The numbers show anything but an escalating

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16. Violent crime has decreased 20.6% since 1994. *See* Federal Bureau of Investigation, Dep't of Justice, *Uniform Crime Reports for the United States–1998*, at 12 (1999). The national murder rate dropped 30% during that period, *id.* at 15, reaching the lowest level–6 per 100,000–since 1967. *Id.* at 14; *see* Bureau of Justice Statistics, Dep't of Justice, *Homicide Trends in the United States* 1 (1999)(stating that murder rate has fallen to lowest level in three decades). Nonfatal firearm injuries have also decreased, falling 40.8% between 1993 and 1997. *See* Centers for Disease Control, *MMWR Weekly Report, Nonfatal and Fatal Firearm Related Injuries–United States*, 1993-1997, at 1 (Nov. 19, 1999).

17. The dissent in the instant case, by relying on FBI statistics for 1970-1992 and ignoring the post-1993 data, is able to paint a dramatic, but grossly misleading, picture of a nation in which "[v]iolent crime committed by juveniles continues to rise." *See J.L.v. State*, 727 So.2d 204, 211 n.8 (Fla. 1998) (Overton, J., dissenting). In reality, juvenile violence has declined nationally by 33% since 1993. *See* Office of Juvenile Justice and Delinquency Prevention, Dep't of Justice, *Juvenile Offenders and Victims: 1999 National Report* 57 (1999). Homicides involving juveniles dropped 39% during that time period. *Id.* at 55. Overall, the serious violent crime rate for juveniles has dipped below the 1973 level. *Id.* at 62. Perceptions of juvenile crime and violence have been distorted by a limited number of highly visible incidents. *Id.* at 51. The search for a proper constitutional

(continued...)

explosion of firearm violence. Consequently, a firearms exception to *Terry* is also factually unjustified.

A "firearms exception" is also inconsistent with the Court's precedents–most tellingly with *Terry* itself. With full awareness of the perils of concealed firearms and the dangers they pose to public safety, the *Terry* Court nonetheless demanded individualized reasonable suspicion for a stop and frisk and strenuously resisted the claim that less could suffice. The suspected armed robbery in *Terry* posed a danger at least as serious as possession of a concealed weapon, yet the Court refused to permit a stop and frisk absent an objective, individualized showing that danger was likely. Aware of the harms threatened by an armed robber (*i.e.*, a robber with a concealed weapon), the Court nonetheless adhered to the Fourth Amendment demand for specific and articulable facts that justify the particular intrusion. The *Terry* Court acknowledged our tradition of armed and violent criminals, *Terry*, 392 U.S. at 23-24, but rejected the proposition that the dangers posed by that tradition could justify random, arbitrary seizures and searches.[18]

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17. (...continued)
balance is not advanced by reliance on those emotionally-charged, unrepresentative tragedies. *See J.L.*, 727 So.2d at 211 n.9 (Overton, J., dissenting)(stringing together the sites of recent school shootings).

18. The Court's awareness of the harm threatened by the prevalence of violence and firearms in our nation is evident in its reliance on the FBI's Uniform Crime Reports for 1966 and its acknowledgment that the "easy availability of firearms to potential criminals in this country is well known and has provoked much debate." *Terry*, 392 U.S. at 24 n.21. The assertion that we now face levels of crime, violence, and firearm use that were unforeseen by, or unforeseeable to, the *Terry* Court is belied by the fact that today's levels are comparable to those in 1967. *See supra* notes 16, 17; *see also* 35 Weekly Comp. Pres. Doc. 2071 (Oct. 17, 1999)(murder
(continued...)

Subsequent decisions have not departed in the slightest from the course mapped out by *Terry*. The Court has not recognized a single exception to the "reasonable suspicion" norm for on-the-street stops and frisks.[19] The result is simple, clear guidance for officers and courts: All stops and frisks require an articulable, reasonable suspicion. Nothing less will do. Nothing less should do.[20]

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18. (...continued)
rate is at its lowest since 1967).

19. Neither the compelling interest in detecting contraband traffickers, *see Sokolow*, 490 U.S. 1 (1989), nor the vital interest in apprehending a violent armed robber, *see United States v. Hensley*, 469 U.S. 221 (1985), has prompted the Court to suspend the reasonable suspicion demand.

20. The rare, exceptional situations in which searches or seizures are reasonable in the absence of particularized, reasonable suspicion are clearly distinguishable from the situation involved here. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), held that seizures at sobriety checkpoints can be reasonable in the absence of individualized suspicion. The compelling, regulatory interest in preventing drunk driving tipped the Fourth Amendment balance in that case *only* because the intrusions upon individuals' liberty and privacy interests were "slight" and "minimal." *Id.* at 451-52. The checkpoint sites were selected according to neutral, objective guidelines, the officers made nondiscretionary stops of all who passed the checkpoint, and the duration of the stops was exceedingly short. None of the factors critical to the outcome in *Sitz* obtain when an officer makes a discretionary decision to stop and frisk an individual suspect based on an anonymous tip.

In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), important "special needs beyond the normal need for law enforcement," were sufficient to tip the Fourth Amendment balance in favor of suspicionless, random drug testing. *See Skinner*, 489 U.S. at 619-20, 633-34. In none of the cases could the evidence found be used in a criminal
(continued...)

Finally, there is no inherent reason to treat firearms differently from any other important public safety interest. Recognition of a "firearms exception" to the reasonable suspicion requirement would constitute a perilous step onto a slippery constitutional slope. A "firearms exception" would lead unavoidably to intolerable erosion of a vital constitutional safeguard against "arbitrary and abusive police practices." *See Brown*, 443 U.S. at 52.

III. THE AUTHORITY TO STOP AND FRISK ON THE BASIS OF UNRELIABLE, UNCORROBORATED, ANONYMOUS TIPS PRECLUDES JUDICIAL SCRUTINY, INVITES OFFICIAL FABRICATION, AND PROMOTES DISCRIMINATORY LAW ENFORCEMENT

There are additional, compelling reasons to reject the contention that stops and frisks based on unreliable, uncorroborated, anonymous tips are consistent with the Constitution. The Fourth Amendment's insistence on judicial review, its concern with official fabrication, and its hostility toward discriminatory law enforcement all support the conclusion that such stops and frisks are unreasonable.

A. Permitting Stops And Frisks Based On

20. (...continued)
prosecution. Moreover, in all three cases the intrusions on the tested individuals were "limited." All of the individuals subject to testing had "diminished expectations of privacy" and all of the testing schemes restricted the intrusiveness of the privacy invasions. Stops and frisks of citizens based on anonymous tips do not serve "special needs" beyond law enforcement. The evidence discovered can be and is used in criminal prosecutions. Perhaps most important, the intrusions are not limited by factors that diminish the victims' expectations of privacy or limit the invasiveness of the searches or seizures.

Unreliable, Uncorroborated, Anonymous Tips Effectively Precludes Meaningful Judicial Review

Judicial review of officers' decisions to search and seize is a fundamental premise of Fourth Amendment jurisprudence. "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The warrant rule requires scrutiny before a search occurs. *See Katz v. United States*, 389 U.S. 347, 357 (1967). When warrants are not required, judicial review takes the form of after-the-fact scrutiny of the factual predicate for official action. Thus, a "court sitting to determine the existence of reasonable suspicion must require the [officer] to articulate the factors leading to that conclusion," and must make an independent review of the totality. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). Officers' awareness that judges will conduct such reviews and will not simply defer to their judgments curbs abuse and discourages mistakes. Moreover, neutral review of the justifications for searches and seizures permits the correction of errors and promotes the vindication of constitutional rights.

If an officer's "subjective good faith alone," "inchoate suspicion," or "inarticulate hunch" were sufficient to support intrusions, "'the people would be "secure in their persons, houses, papers and effects," *only in the discretion of the police*.'" *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (emphasis added). It would be virtually impossible for judges to conduct meaningful, independent

review of such amorphous, nonobjective predicates. Without the prospect of independent review, overzealous law enforcement would go unchecked, official mistakes would go undeterred, and violations of constitutional interests would go unsanctioned. As the *Terry* Court realized, enforcement of a substantive, objective reasonable suspicion requirement is essential to preserve the reality of judicial scrutiny.

Officers' decisions would effectively be immunized from judicial scrutiny if an unknown tipster's bare assertion that a black man wearing a certain shirt in a particular place has a weapon were enough to justify a stop and frisk. There would be next to nothing for judges to evaluate and no reason for officers to fear that their decisions to intrude will be overturned. The result would be "arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51 (1979).[21]

B. Permitting Stops And Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Invites Official Fabrication

The Fourth Amendment's concern with falsehood and fabrication by law enforcement officers is evident in both the constitutional text and the Court's opinions. The textual demand that warrant applications be "supported by Oath or affirmation" discourages misrepresentation by raising the specter of punishment for perjury. By requiring officers to secure warrants, the warrant rule both gives force to the "Oath or affirmation" demand and precludes hindsight-based fabrication of justifications for searches. *See Katz*, 389 U.S. at

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21. Because many of the victims of the unreviewable, yet unjustified, invasions would be "innocent" citizens, there is particular reason for concern.

358. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court evinced a belief that Fourth Amendment doctrine should be designed to prevent and correct official misrepresentations by holding that warrants are invalid if based on intentional or reckless falsehoods.

Nothing in the Constitution or the Court's opinions can eliminate all official fabrication. No matter what rules, penalties, or remedies are constructed to discourage the odious practice of lying by the police, understandable temptations to falsify will lead some officers to do so. Nonetheless, the standards that give content to Fourth Amendment liberties can and should be designed to minimize risks and diminish temptations. The law should not "invite" official fabrication.[22]

The less an officer has to assert to support her actions, the lower the risk of being caught in a lie. If vague, undetailed assertions with minimal, irrefutable corroboration are sufficient, there is almost no chance of later contradiction. Moreover, if the critical accusations can come from the mouth of an unidentified and unidentifiable source, the likelihood that an officer will be held responsible for disproven assertions is diminished even further. Thus, if an officer need only state that an anonymous tipster claimed that a young black man wearing a plaid shirt was standing at a bus stop and had an illegal weapon, the risk of untruths coming to light is minuscule.[23] A holding that such barebones tips are enough is

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22. Even if most officers are honest and would resist the temptation to falsify, Fourth Amendment law must provide safeguards against "the overzealous and unscrupulous officer." *See Alabama v. White*, 496 U.S. 325, 333 (1990)(Stevens, J., dissenting).

23. The risk could be cognizable if officers had to make their showings before stopping and frisking a suspect. Because all showings in

(continued...)

an invitation to operate on the basis of a hunch, a feeling, or an unreasonable suspicion. In cases where something is found, officers can easily tell a "harmless" lie about the existence of an unnamed informant.[24] "[E]very citizen [would be] subject to being seized and [frisked] by any officer who is prepared to testify that the warrantless stop [and frisk were] based on an anonymous tip" describing the clothing and location of the suspect and asserting that he had a weapon. *See White*, 496 U.S. at 333 (Stevens, J., dissenting).

To minimize the temptation to fabricate and the motivation to stop and frisk on inadequate grounds, the Court should adhere to the *Alabama v. White* demand for "something more" whenever anonymous tips are involved.[25] Fidelity to the Fourth Amendment's concern with falsification requires as much.

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23. (...continued)
support of *Terry* detentions are made after the fact, the risk that the facts discovered will be inconsistent with those sworn to in advance is nonexistent.

24. Some who are intimately involved in the criminal justice system believe that officers frequently tell "small lies" in order to justify unlawful searches and seizures. *See* Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, L.A. Times, Dec. 31, 1999, at A1 (former Kansas City chief of police "believes hundreds of thousands of police officers tell those kinds of lies in court every year" and current Ninth Circuit judge "has called this kind of police perjury widespread").

25. Searches and seizures based on official misrepresentations will often intrude on those engaged in no wrongdoing. Consequently, the constitutional concern with fabrication is once again explicable, in part, by the desire to protect "innocents" against deprivations of fundamental freedoms. In the instant case, two innocent young men were frisked apparently because of their association with the subject of an unsubstantiated, anonymous tip.

C. Permitting Stops And Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Generates Unacceptable Risks Of Discriminatory Law Enforcement

If a search or seizure is supported by objective facts known to an officer, the officer's subjective, discriminatory motivations do not render her conduct unreasonable under the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806 (1996). This does not mean, however, that the risks and consequences of discriminatory law enforcement are necessarily irrelevant to Fourth Amendment analysis. The precedents suggest, and properly so, that a concern with preventing discriminatory deprivations of constitutionally guaranteed privacy and liberty should factor into Fourth Amendment analyses.

The *Terry* Court was aware of and sensitive to the "harassment" and "humiliation" of certain groups, particularly the young and minorities, by some police officers. *See Terry*, 392 U.S. at 14, n.11. The refusal to permit stops and frisks based on hunches or unparticularized suspicions and the insistence on objective, reasonable suspicion were rooted in a recognition of the dangers of arbitrariness and abuse inherent in excess official discretion. One of those dangers is invidious discrimination. By rejecting the arguments in favor of unrestricted discretion to stop and frisk, the Court barred officers from relying on race, age, gender, or other irrelevant grounds to justify stops and frisks and provided at least some protection against destructive, discriminatory law enforcement.

The availability of Fourth Amendment "pretext" claims in situations where searches and seizures are not based on probable cause–most notably, in inventory and administrative search contexts, *see Whren*, 517 U.S. at 811–provides further

evidence that a concern with discrimination does play a role in Fourth Amendment jurisprudence. Thus, inventories are only permissible if they are conducted pursuant to "standardized procedures" and if choices are guided by "standard criteria" that restrict official discretion. *See Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). In addition, the doctrine that governs those rare searches and seizures that are justifiable without individualized showings of suspicion evinces a distinct concern with discouraging and preventing searches and seizures based on inappropriate considerations. Random stops at sobriety checkpoints are permitted only if site selection depends on neutral guidelines and checkpoint operation is nondiscretionary. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990). And the reasonableness of random drug tests hinges, in part, on the "standardized nature of the tests" and "the minimal discretion vested in those charged with administering the [testing] program." *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989). At least in part, these doctrinal limitations reflect the view that discriminatory law enforcement is inconsistent with constitutional values.

Approval of a stop and frisk based on an allegation that an unknown, unidentified person has asserted that an individual at a particular location wearing certain clothing has an illegal weapon would generate enormous risks of discriminatory law enforcement. A showing of cause that is so minimal and that can be fabricated so easily affords officers so much discretion it literally invites arbitrary and discriminatory law enforcement.[26] While many officers would decline the

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26. A grossly disproportionate number of the lower court cases that uphold stops and frisks based on anonymous tips plus a small amount (continued...)

invitation, some undoubtedly would yield to the temptation to discriminate.[27] The negligible threshold for stops and frisks advocated by the government in this case would "permit[] 'those to discriminate who are of a mind to discriminate.'" *Batson v. Kentucky*, 479 U.S. 79, 96 (1986). This undeniable reality and its negative impacts on innocent citizens and on our nation is yet another reason for the Court to affirm the decision of the Florida Supreme Court.

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26. (...continued)
of corroboration (ordinarily more than in the present case) involve tips about "a black man." *See, e.g., United States v. DeBerry*, 76 F.3d. 884, 885 (7th Cir. 1996); *State v. Sharpless*, 715 A.2d 333, 336 (N.J. Super. Ct. App. Div. 1998). These, of course, are only the reported stops and frisks–those in cases where crime was detected. The logical inference is that a disproportionate number of innocent minority group members have also suffered the indignities of a stop and frisk.

27. One need not rely entirely on common sense to support this conclusion. In a recent, groundbreaking study of the stop and frisk practices of the New York City police, the Office of the Attorney General of New York found evidence that race has played a role. *See* Civil Rights Bureau, Office of the Attorney General of the State of New York, *The New York City Police Department's "Stop & Frisk" Practices*, iv-xi (Dec. 1, 1999). The report found that while blacks comprise 25.6% of the city's population, 50.6% of the persons stopped were black. *Id.* at 94. Whites constitute 43.4% of the city's population, but account for only 12.9% of the stops. *Id.* at 94-95. Data compiled about the practices of the New York Police Department's Street Crimes Unit (SCU)–a unit primarily concerned with removing illegal weapons from the community–furnished additional evidence of discrimination. The stop-to-arrest ratios of the SCU (the number of stops made for every arrest) were 16.3 blacks stopped per arrest, 14.5 Hispanics stopped per arrest, and 9.6 whites stopped per arrest. *Id.* at 117. According to the report, the disparities found could not be fully explained by the higher crime rates in the neighborhoods where minorities reside. *Id.* at 117-34. Race also played a role. *See id.* at 119. Diminishing the showing needed for a stop and frisk can only exacerbate an already troubling situation.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Florida should be affirmed.

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No. 98-1993

In The
SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,
Petitioner,

v.

J.L.,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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January 25, 2000

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QUESTION PRESENTED FOR REVIEW

1. Whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location with a detailed description of the person and his attire is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip.

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In The
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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and the European Union. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998), *Illinois v. Wardlow*, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000), and *Apprendi v. New Jersey*, 120 S.Ct. 525 (cert. granted), Sup. Ct. No. 99-0478 (October Term 1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught

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[1] *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Letters of consent from the parties' counsel are on file with the Clerk of the Supreme Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, is supporters, or is counsel, made a monetary contribution to the preparation or submission of this brief.

continuing legal education classes in this area as well.

II. SUMMARY OF ARGUMENT

The Petitioner asks the Court to extend the scope of permissible investigatory police "stop and frisk" searches to searches based upon no observations of suspicious activity or credible, verifiable third-party information. *Amicus curiae* The Rutherford Institute respectfully submits that broadening police *Terry* authority in this manner would expand the rationale of *Terry* and its progeny beyond recognition, and threaten to completely obviate the protections from police harassment of citizens afforded by the Fourth Amendment.

III. ARGUMENT

The Court's *amicus* submits that the State of Florida seeks an unreasonable and abusive expansion of the rationale for permitting brief investigatory stops enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) and subsequent cases. *Terry v. Ohio* reviewed an officer's decision to conduct a "pat-down" search for weapons after observing the subjects engaged in behavior consistent with "casing" a store for a burglary. 392 U.S. at 10-11. The opinion of the Court was carefully and explicitly limited in rationale to a concern entirely apart from the governmental interest in investigating crime: the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. at 23. The Court cautioned:

> [S]uch a search ... is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the

> present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

392 U.S. at 29.[2]

Nonetheless, commencing almost immediately after the Court's companion decisions in *Terry v. Ohio* and *Sibron v. New York*, 392 U.S. 40 (1968), the carefully crafted exception to the probable cause requirement enunciated in those cases has been progressively expanded until, as one former Justice warned, the *Terry* exception threatens to "swallow the general rule that Fourth Amendment seizures [and searches] are reasonable only if based on probable cause." *Florida v. Royer*, 460 U.S. 491, 509 (1983) (Brennan, J., concurring) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)). The expansion began with *Adams v. Williams*, 407 U.S. 143 (1972), which extended the police safety rationale of *Terry* to permit pat-down searches based on reasonable suspicion of possessory offenses, over the vigorous dissents of three of the Justices, one of whom warned that the decision "expand[ed] the concept of warrantless searches far beyond anything heretofore recognized as legitimate." 407 U.S. at 154-55. It continued with an extension of *Terry* stop authority to conduct vehicle searches

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[2] For this reason, the Court reversed the conviction of the defendant in the companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), on the grounds that a frisk motivated only by a search for narcotics "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Id.* at 65.

for illegal immigrants, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), then to permit searches based upon reasonable suspicion of past criminal activity alone. *United States v. Hensley*, 469 U.S. 221 (1985). The expansion of *Terry* has culminated in the Court's opinion this session in *Illinois v. Wardlow*, Sup. Ct. No. 98-1036 (January 12, 2000), which held that officers may chase down and detain subjects who flee at the appearance of police in a high-crime area, even absent factors that suggest particular criminal activity is afoot.

The Petitioner now seeks to further broaden the use of investigatory stops to permit peace officers to stop and frisk citizens based only on an anonymous tip that the subject is presently armed, uncorroborated by objective facts indicating reliability. For the reasons set forth below, the Court's *amicus* believes such a further expansion would be patently unreasonable and indefensible.

Amicus urges the members of the Court to bear in mind the invasive and humiliating nature of a "stop and frisk" search. The *Terry* Court restricted the use of the procedure in light of this understanding:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for

weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25.

For this reason, investigative searches and seizures are to be employed only where necessary, and limited in scope and duration to inquiries and procedures that will dispel or confirm the officer's concerns as expeditiously as possible. "[I]f the person refuses to answer and the police take additional steps ... to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S. 210, 217 (1984). The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. at 500.

Above all, the facts giving rise to such searches are required to be objective, verifiable and credible. "[The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. While the Court's recent decision in *Illinois v. Wardlow*, Sup. Ct. No. 98-1036 (January 12, 2000), reemphasized its adherence to the "totality of the circumstances" approach, factors such as the "veracity" of the informant, his "reliability" and the "basis of [the informant's] knowledge" remain "highly relevant in determining the value of [the informant's] report." *Alabama v. White*, 496 U.S. 325, 329 (1990), quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

This Court discussed extensively the specificity requirement in the context of anonymous tips a decade ago in *Alabama v.*

White, *supra*. "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity insofar as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" 496 U.S. at 329, quoting *Illinois v. Gates*, 462 U.S. at 237. The anonymous tip in *White* would have been insufficient to justify the stop, the Court said, except that further investigation by police officers provided corroboration of the details in the tip, including the place and approximate time of departure of the suspect, a description of her vehicle and her destination. 496 U.S. at 331. "Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller," the Court concluded. *Id.* The Court also found it important that the tip contained details that related not just to facts and conditions existing at the time of the tip which any observer could have noted – such as the description of a car parked outside the suspect's building – but to future actions of third parties that were not easily predicted:

> What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information -- a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. When

> significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Alabama v. White, 496 U.S. at 332 [citations omitted].[3] For the majority in *White*, this degree of specificity was sufficient. The dissent, in an opinion written by Justice Stevens, contended that more was required:

> Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion.

496 U.S. at 333 (Stevens, J., dissenting). Thus, the members of the Court diverged in *White* over the quantum of specificity required to substantiate an anonymous tip leading to a *Terry* stop, not on the necessity for substantiation. The stop in the instant case involved no substantiation whatsoever, and consequently the standard set forth in *Illinois v. Gates* and

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[3] The requirement for corroboration of criminal information has always been foundational to American criminal jurisprudence. *Cf., Spinelli v. United States*, 394 U.S. 410 (1969) (corroboration existed) and *Illinois v. Gates*, 462 U.S. 213 (1983) (extrinsic evidence based upon totality of circumstances) with *Aguilar v. Texas*, 378 U.S. 108 (1964) (corroboration lacking) and *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1963) (extrinsic corroboration lacking). In fact, this mandate hearkens back to the Magna Carta. McKechnie, *MAGNA CARTA*; A COMMENTARY ON THE GREAT CHARTER OF KING JOHN., pp. 370-377; 3 Rotunda, Treatise on Constitutional Law (Vol. 3) § 23.20.

Alabama v. White requires affirmance of the Florida Supreme Court's decision.[4]

It is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). On the other hand, "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. The circumstances before the Court

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[4] *Cf. United States v. Walker*, 7 F.3d 26 (2nd Cir. 1993):

> Any mischievous member of the public could observe a distinctive-looking or distinctively-dressed person purchase a train ticket or board a train and could telephone a description and an accusation ahead to authorities at the train's destination. I believe that some indicium of reliability other than merely an accurate description of an individual's physique and whereabouts, which any observant stranger could provide, should be required before the individual may be stopped and detained.

Id. at 31 (Kearse, C.J., dissenting) [citations omitted]. *See also United States v. Deberry*, 76 F.3d 884, 886 (7th Cir. 1996) (Posner, C.J.)("to deem the [anonymous] tip adequately corroborated by circumstances that ... show nothing more than that the tipster had seen the person he was reporting would be mere bootstrapping, for the tipster could easily be a prankster who seeing a perfectly innocent-looking person in the street calls up the police and describes the location and appearance of the person.")

raise the spectre of such a regime, in which bullying tactics would take the place of proper investigation as the principle means of crime control. As Justice Stevens cautioned in his dissent in *Alabama v. White*:

> [U]nder the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

496 U.S. at 333 (Stevens, J., dissenting). The hazards to the integrity of law enforcement expressed by Justice Stevens in *White* would be heightened many fold in the instant case if the Petitioner and law enforcement agencies like it throughout the country are supplied the power to stop and frisk individuals on the street merely by alleging an anonymous report of weapons possession.

The dangers of such a regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court .... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). Diligence is necessary, the Court has warned, to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers). One example of such a case is *Brown v. Texas*, 443 U.S. 47 (1979), in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress for this deprivation of his constitutional liberties because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53. If the practice advanced by the Petitioner is declared constitutional by this Court, an untold number of innocent citizens may become victims of legal, systematized harassment by authorities. The delicate balance of individual liberty and the orderly administration of justice sought by the Framers of the Bill of Rights and the members of this Court may not survive the consequences of such a regime.

IV. CONCLUSION

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948). Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). *Amicus* The Rutherford Institute suggests that in this case, Florida seeks to allow its zeal for law enforcement outstrip its judgment. The decision of the Supreme Court of Florida should accordingly be affirmed.

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No. 98-1993

IN THE

Supreme Court of the United States

STATE OF FLORIDA
Petitioner

v.

J. L., a juvenile,
Respondent

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF AMICI CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA & INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's decision on its face constitutes a plain statement that it is alternatively based on bona fide separate, adequate, and independent state grounds, and, therefore, pursuant to Michigan v. Long, 463 U.S. 1032 (1983), this Court should not undertake to review the decision of the Florida Supreme Court.

2. Whether the Florida Supreme Court erred in declining to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Both petitioner and respondent have graciously consented to the filing of this brief, which supports the position of respondent.

The National Rifle Association of America, chartered in 1871, is a nonprofit, nonpartisan, nationwide membership organization. The NRA is not only the oldest sportsmen's organization in America, but also is an educational, recreational, and public service organization dedicated to the right of the individual citizen to own and use firearms for lawful defense and recreation.

The NRA is a New York not-for-profit corporation and is recognized as a § 501(c)(4) corporation under the Internal Revenue Code. The NRA's principle office is in Fairfax County, Virginia. It is supported by membership dues and contributions from public-spirited members and clubs. It is not affiliated with any arms or ammunition manufacturer nor with any business which deals in firearms or ammunition. It receives no appropriations from Congress.

The NRA has previously filed numerous amicus curiae briefs in both state and federal courts. Recent example are United States v. Emerson, U.S. Court of Appeals for the 5th Circuit, Appeal No. 99-10331; HC Gun & Knife Shows v. City of Houston, U.S. Court of Appeals for the 5th Circuit, Appeal No. 98-20497; Kasler v. Lungren, California Supreme Court No. S069522, reviewing 61 Cal. App.4th 1237, 72 Cal. Rptr.2d 260 (1998); Edwards v. City

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

of Goldsboro, 178 F.3d 231 (4th Cir. 1999). A recent example before this Court is Printz v. United States, 138 L.Ed.2d 914 (1997). Furthermore, the NRA is familiar with the questions involved in this case and the scope of their presentation. It will oppose petitioner's invitation to this Court to carve out a firearm or weapons exception to the 4th Amendment.

The Independence Institute is a free market think tank based in Golden, Colorado. Dedicated to the ideals of the Declaration of Independence, the Independence Institute has been rated as one of the four most effective state level think tanks by The Nation magazine. The Institute has previously filed amicus curiae briefs in cases involving the First Amendment, the Second Amendment, and the Colorado Constitution. The Institute's extensive research on criminal justice issues is available at http://i2i.org/crimjust.htm

SUMMARY OF ARGUMENT

The Florida Supreme Court held that "[f]or the reasons expressed below, we decline the State's invitation to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution." J.L. v. State, 727 So.2d 204, 205 (Fla. 1998). The Florida Supreme Court relied mainly on two state cases—Butts v. State, 644 So.2d 605 (Fla. Ct. App. 1994), and Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997)—to find the search and seizure of J. L. to be constitutionally unreasonable. This constitutes a plain statement that the Florida Supreme Court's opinion is alternatively based on bona fide separate, adequate, and independent state grounds. In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that it is without jurisdiction to

review a state court decision which rests on an adequate and independent state ground.

J. L. was subject to a search and seizure based on an anonymous tip. The police were unable to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted an intrusion on J. L.'s Fourth Amendment rights. The police were able to corroborate only innocent behavior. The stop and frisk fails to meet the standards enunciated in Terry v. Ohio, 392 U.S. 1 (1968). The anonymous tip failed to exhibit sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop under Alabama v. White, 496 U.S. 325 (1990). The Florida Supreme Court accordingly found a violation of the Fourth Amendment and the Florida Constitution. It refused to carve out a firearm or weapon exception to the federal and state constitutions. Its decision was correct and should not be disturbed.

ARGUMENT

1. THE FLORIDA SUPREME COURT'S DECISION ON ITS FACE CONSTITUTES A PLAIN STATEMENT THAT IT IS ALTERNATIVELY BASED ON BONA FIDE SEPARATE, ADEQUATE, AND INDEPENDENT STATE GROUNDS, AND, THEREFORE, PURSUANT TO MICHIGAN v. LONG, 463 U.S. 1032 (1983), THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE DECISION OF THE FLORIDA SUPREME COURT.

This case presents a jurisdictional question that should be addressed before reaching the Fourth Amendment to the

United States Constitution. The Florida Supreme Court is at liberty to provide state law protection of the rights of the people of Florida above and beyond the protection which is guaranteed by the United States Constitution. This Court has explicitly acknowledged each state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Prune Yard Shopping Center v. Robbins, 447 U.S. 259, 266-67 (1980). The state law ground in this case is clearly adequate to support the judgment of the Florida Supreme Court, and the state law ground is independent of the Florida Supreme Court's understanding of federal law.

Article I, § 12 of the Florida Constitution addresses searches and seizures and provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

This means that Florida's constitutional provision on searches and seizures is linked to this Court's Fourth Amendment jurisprudence. Nonetheless, the Florida Supreme Court has interpreted this linkage in such a way that Florida's constitutional provision on searches and seizures has an existence and scope independent of the Fourth Amendment until this Court issues a controlling decision. In the absence of a controlling decision from this Court, Florida courts are still free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. Furthermore, the Florida Supreme Court decides independently for itself whether a decision from this Court is controlling. Soca v. State, 673 So.2d 24, 26-27 (Fla. 1996). A misinterpretation by the Florida Supreme Court of the rulings of this Court when construing the Florida Constitution is still an interpretation of the Florida Constitution. An interpretation of state law even under such circumstances is still beyond the jurisdiction of this Court under Michigan v. Long, 463 U.S. 1032 (1983).

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that it is without jurisdiction to review a state court decision which rests on an adequate and independent state ground. This Court noted that respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. If a state court chooses merely to rely on federal precedents, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates

clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, this Court will not undertake to review the decision.

In the present case the Florida Supreme Court did consider the rulings of other jurisdictions which appear to recognize a firearm exception to the general rule requiring reasonable suspicion before a pat-down search can lawfully occur. However, the Florida Supreme Court then plainly stated that it joins the Pennsylvania Supreme Court in rejecting this exception. J. L. v. State, 727 So.2d 204, 209 (Fla. 1998).

The first paragraph of the Florida Supreme Court's opinion held: "For the reasons expressed below, we decline the State's invitation to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution." J.L. v. State, 727 So.2d 204, 205 (Fla. 1998). In reaching this result, the Florida Supreme Court relied on Butts v. State, 644 So.2d 605 (Fla. Ct. App. 1994), a state case. Furthermore, the Florida Supreme Court unambiguously rejected federal cases—United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996); United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992)—appearing to carve out a firearm exception to the reasonable suspicion test to justify a stop and frisk pursuant to Terry v. Ohio, 392 U.S. 1 (1968). Instead, the Court joined in the reasoning of the Pennsylvania Supreme Court in Commonwealth v. Hawkins, 692 A.2d 1068 (Pa. 1997). Hawkins is a state case that rests on state law. This demonstrates clearly that the Florida Supreme Court looked at federal caselaw, rejected it, and independently embraced state law guaranteeing broader protection to the people than federal law. Under Michigan v. Long, 463 U.S. 1032

(1983), then, this Court should not undertake to review the Florida Supreme Court's decision. This would be in harmony with this Court holding that it is fundamental that state courts be left free and unfettered in interpreting their state constitutions.

In conclusion, the Florida Supreme Court's decision on its face constitutes a plain statement that it is alternatively based on bona fide separate, adequate, and independent state grounds. Therefore, pursuant to Michigan v. Long, 463 U.S. 1032 (1983), this Court should not undertake to review the decision of the Florida Supreme Court.

2. THE FLORIDA SUPREME COURT DID NOT ERR IN DECLINING TO CREATE A FIREARMS OR WEAPONS EXCEPTION TO THE LIMITATIONS ON SEARCHES AND SEIZURES SET OUT IN THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This case involves a juvenile. The states treat the possession of firearms by juveniles differently than the possession of firearms by adults for reasons that are so apparent that discussion is not needed. However, the petitioner's sweeping argument, if adopted, would essentially create a firearm or weapons exception to the Fourth Amendment. This sweeping argument was considered by the Florida Supreme Court and was correctly rejected.

The purpose of a police stop and frisk is to prevent criminal activity. Some activity is always criminal. Other activity is only criminal under certain conditions. The peaceful carrying of a firearm falls into the latter category.

Numerous states have nondiscretionary right-to-carry firearm laws. Such state laws allow a responsible law-abiding adult to obtain a license or permit to carry a handgun concealed. Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679 (1995). These laws have had a beneficial impact on crime. John R. Lott, Jr., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 43, 46, 94, 114 (1998 Univ. Chicago Press).

Furthermore, in numerous states a person has a constitutional right to peacefully carry a firearm unconcealed. Holland v. Commonwealth, 294 S.W.2d 83, 85 (Ky. 1956). Laws that unduly restrict the right to carry firearms have been voided. State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 377 S.E.2d 139 (1988) (struck down firearm carrying law as too restrictive); Junction City v. Mevis, 226 Kan. 526, 601 P.2d 1145 (1979)(struck down firearm carrying ordinance as too broad); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (1972)(struck down firearm law on sale, possession, and carrying as too broad); City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct.App. 1971)(struck down firearm carrying ordinance as too restrictive); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936)(struck down law prohibiting possession of a firearm); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928)(struck down firearm carrying ordinance as too restrictive); People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922)(struck down statute prohibiting possession of a firearm); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921)(struck down pistol carrying license and bond requirement law as too restrictive); State v. Rosenthal, 75 Vt.

295, 55 A. 610 (1903)(struck down pistol carrying ordinance as too restrictive); In re Brickey, 8 Idaho 597, 70 P. 609 (1902)(struck down firearm carrying statute as too restrictive).

Therefore, a police officer's knowledge that a person is peacefully carrying a firearm, in and of itself, does not furnish probable cause to believe that the person is illegally carrying that firearm. The resultant stop is improper under Fourth Amendment principles. Commonwealth v. Couture, 407 Mass. 178, 552 N.E.2d 538 (1990), cert. denied, 498 U.S. 951 (1990).

Indeed, law enforcement officers receive training which correctly reflects this aspect of the law. Federal officers who receive an anonymous phone tip claiming criminal activity, without more, are not trained to effect a Terry stop or pat-down search. A frisk in a public place is not a petty indignity. Instead, the officers must also possess sufficient information to corroborate the anonymous tip about criminal activity. There must be sufficient facts indicating the anonymous tip is reliable so as to give rise to a reasonable suspicion that criminal activity is afoot. Whether reasonable suspicion exists is determined by the totality of the circumstances test. In this case the anonymous tip stated only "that several young black males were standing at a specified bus stop during the daylight hours.... [T]he one wearing the 'plaid-looking' shirt, was carrying a gun." Further observation by the police revealed no suspicious or illegal conduct and no additional suspicious circumstances. Nonetheless, two police officers, without questioning or other introduction, seized all three young men and subjected them to a frisk. The record fails to disclose that any of the police officers even suspected J. L. of being a juvenile. 727 So.2d at 205. The anonymous tip failed to exhibit sufficient indicia of reliability to provide

reasonable suspicion to make an investigatory stop. Alabama v. White, 496 U.S. 325 (1990). Therefore, all you had was an anonymous tip about criminal activity and no specific and articulable facts which, taken together with rational inferences from those facts, would reasonably warrant an intrusion on Fourth Amendment rights.

Some will argue for creating a firearm exception to the Fourth Amendment for policy reasons. However, this Court has rejected a flag burning exception to the First Amendment, a crime scene exception to the Fourth Amendment, and a threat of mob violence and popular resistance exceptions to the equal protection guarantee of the Fourteenth Amendment. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990); Mincey v. Arizona, 437 U.S. 385 (1978); Cooper v. Aaron, 358 U.S. 1 (1958). It should likewise reject a firearm or weapon exception to the Fourth Amendment.

In this light, the Florida Supreme Court correctly decided the case before this Court.

CONCLUSION

For the reasons presented in the argument, amici curiae respectfully submit that the Court should relinquish jurisdiction or affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF AMICUS CURIAE OF THE CONGRESS OF RACIAL EQUALITY, INC. IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court ruled correctly in declining to create a "firearms exception" to the Fourth Amendment to the United States Constitution.

2. Whether the judicial creation of a "firearms exception" to the Fourth Amendment to the United States Constitution would result in the increased violation of the civil rights of African-Americans, the poor and other minorities.

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STATEMENT OF INTEREST AND IDENTITY OF AMICUS CURIAE[1]

The Congress of Racial Equality, Inc. (generally and well-known as "CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations, which is primarily interested in the welfare of the black community, and the protection of the civil rights of all citizens.

CORE has programs to support senior citizens and curb drug abuse, it maintains a Disability Rights Project, raises and distributes food to the needy, counsels teenagers, organizes volunteers to inspect housing for unsanitary and hazardous conditions, helps unwed and abandoned mothers accept employment by finding day care centers for their children, manages sports programs for young people, runs "job banks" to find work for the unemployed, tutors students to improve their reading skills, works with candidates for civil service examinations, helps small entrepreneurs acquire business skills, helps register new voters, sponsors minority dancers, singers, painters and other artists, finds summer work for black students, helps workers in cases of job discrimination, maintains a list of volunteer attorneys, publishes magazines and literature dealing with subjects of interest to its members and supporters, and engages in litigations in support of its objectives.

In particular, CORE has involved itself in the fight against crime, the scourge of black neighborhoods, and in the effort to shape a more effective and responsive system of

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

criminal justice, including prison reform. Blacks are disproportionately the perpetrators and the victims of crime in our country. Members of the family of CORE's National Chairman, Roy Innis, have been victimized and murdered by criminals. CORE seeks on the one hand to preserve and rescue young blacks from the Slough of Despond to which centuries of social and economic discrimination have consigned them, and which leads them, unconvinced of their own value as human beings, to resort to crime. At the same time CORE seeks to ensure that suspects, whatever their background, once arrested are promptly and fairly tried, and if found guilty, are sentenced and properly punished.

CORE also believes that those who may be victimized by violent criminals have a right to self-defense secured by constitutional and common law, and that the right to self-defense includes the right to the possession by responsible adults of defensive weapons, including firearms, subject to law. CORE recognizes that the decision to own a gun for self-defense necessarily involves some degree of willingness to use it against another person. Such a decision is not light or easy, and involves important ethical, moral and religious issues. Therefore, CORE does not venture to advise anyone to own a gun for self-defense. Nevertheless, CORE is convinced that those who conclude they should arm themselves against the crime run rampant in many poor minority neighborhoods which are rarely if ever afforded adequate police protections, should have the right to do so, subject to applicable law.

CORE has previously filed numerous amicus curiae briefs in both state and federal courts. The most recent example is United States v. Emerson, U.S. Court of Appeals for the 5th Circuit, Appeal No. 99-10331.

CORE opposes petitioner's request to create a firearms exception to the Fourth Amendment.

STATEMENT OF THE CASE

Florida law does not generally prohibit the possession of firearms. In fact, the Declaration of Rights in the Florida Constitution protects the right of Florida citizens to possess arms for self defense: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8(a). The Florida Constitution and Florida statutes allow citizens to carry a concealed firearm with a proper license. FLA. CONST. art. I, § 8(b) and FLA. STAT. § 790.06 (1997). The State of Florida, in a declaration of policy incorporated in its "Weapons and Firearms" statute, recognizes the constitutionally protected lawful ownership and use of firearms for sporting purposes, collecting, hunting and self defense.

> It is the intent of the Legislature that adult citizens of the state retain their constitutional right to keep and bear firearms for hunting and sporting activities and for defense of self, family, home, and business and as collectibles. Nothing in this act shall be construed to reduce or limit any existing right to purchase and own firearms, or to provide authority to any state or local agency to infringe upon the privacy of any family, home, or business, except by lawful warrant.

FLA. STAT. § 790.173(2) (1997).

In the present case, police received an anonymous tip that "several young black males were standing at a specified bus stop during daylight hours" and that one of them, in a "plaid looking" shirt, was carrying a gun. J.L. v. State of Florida, 727 So.2d 204, 205 (Fla. 1998). "The three males were engaged in no suspicious or illegal conduct and no additional suspicious circumstances were observed by the officers." Id. The officers, without any questioning or further

investigation, seized and frisked the three black males. Id. A firearm was recovered from J.L.'s pocket. Id.

OPINION BELOW

The opinion of the Florida Supreme Court is reported as J.L. v. State of Florida, 727 So.2d 204 (Fla. 1998). The opinion of Florida's Third District Court of Appeal is reported as State v. J.L., 689 So. 2d 1116 (Fla. 3d DCA 1997).

"At trial, J.L.'s motion to suppress the gun was granted." 727 So.2d at 205. The Third District Court of Appeals reversed and remanded. 689 So. 2d at 1118. The Florida Supreme Court quashed the decision of the Court of Appeals, "declin[ing] the State's invitation to create a firearm or weapons exception to the limitations on searches and seizures set out in the Fourth Amendment to the United States Constitution and the parallel provisions of the Florida Constitution." 727 So.2d at 209 and 205. This Court granted the petition for certiorari on November 1, 1999.

SUMMARY OF ARGUMENT

The creation of a "firearms exception" to the Fourth Amendment would be unconstitutional. Neither the Fourth Amendment nor its Florida constitutional counterpart provides for a "firearm exception" to their protections. U.S. CONST. amend. IV and FLA. CONST. art. I, § 12. Furthermore, both the federal Bill of Rights and the Florida Declaration of Rights make the possession of firearms a fundamental civil right. U.S. CONST. amend. II and FLA. CONST. art. I, § 8.

> The effect of allowing a "firearms exception" would be the equivalent of saying that there are no unreasonable searches and seizures, and thus no Fourth Amendment rights, so long as the anonymous informant uses the magic word "firearm." To allow such an exception would threaten the basic protections of this nation's Constitution.

727 So.2d at 210 (Harding, C.J., concurring).

Of course, such an exception to the Fourth Amendment's protections would have a disparate impact upon blacks, other minorities, and the poor. It is doubtful that the policemen in the present case, upon the anonymous tip only, would have approached three white men in business suits in an affluent neighborhood, and, without further investigation and without any introduction or explanation, seized and frisked the three.

The fact is that J.L. and his two friends were not engaged in any illegal or suspicious activities. Furthermore, the possession of a firearm is not illegal. "The tip did not involve suspicious behavior which the police could have verified as suspicious upon arrival; rather the tip involved innocent details, none of which involved incriminating or criminal behavior." 727 So.2d at 207. It is hard to escape the conclusion that J.L. and his two friends were seized and frisked because the tip involved the words "black" and "gun."

Of course, this is not surprising, as the history of gun control in America has been one of discrimination, disenfranchisement and oppression of blacks, other racial and ethnic minorities, immigrants, and other unwanted elements. Robert J. Cottrol and Raymond T. Diamond, Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity--The Redeemed South's Legacy to a National Jurisprudence?, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert J. Cottrol and Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Georgetown L.J. 309-361 (1991); Raymond G. Kessler, Gun Control and Political Power, 5 Law & Pol'y Q. 381 (1983). Gun control laws were often

specifically enacted to disarm and facilitate repressive action against these groups. Id.

The disarmament and oppression of newly freed blacks in the South after the Civil War, moved the Reconstruction Congress to pass civil rights laws and the Fourteenth Amendment in order to guarantee to the freedmen, amongst other protections, the protections afforded by the Second Amendment's individual fundamental right to keep and bear arms.

More recent, facially neutral, gun control laws have been enacted for the alleged purpose of controlling crime. Often, however, the actual purpose or the actual effect of such laws has been to discriminate or oppress certain groups. Id.; Ex Parte Lavinder, 88 W.Va. 713, 108 S.E. 428 (1921) (striking down martial law regulation inhibiting possession and carrying of arms). As Justice Buford of the Florida Supreme Court noted in his concurring opinion narrowly construing a Florida gun control statute:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers ... . The statute was never intended to be applied to the white population and in practice has never been so applied .... [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.

Watson v. Stone, 148 Fla. 516, 524, 4 So.2d 700, 703 (1941) (Buford, J., concurring).

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. Present day enforcement of gun laws are often targeted at minorities and the poor and often result in illegal searches and seizures of innocent minority and poor citizens.

The creation of a "firearms exception" to the Fourth Amendment would not only be violative of the Fourth Amendment but would also be an invitation to unjustifiably seize and frisk any citizen if an anonymous source uses the magic word "gun" or "firearm." If the past and present are any indication, then it will be minorities (say for instance, three black males at a bus stop) who will be the primary victims of such unwarranted searches and seizures.

ARGUMENT

I. GUN CONTROL MEASURES HAVE BEEN AND ARE USED TO DISARM AND OPPRESS BLACKS AND OTHER MINORITIES

A. Gun Control in the Slave Codes

The development of racially based slavery in the seventeenth century American colonies was accompanied by the creation of laws meting out separate treatment and granting separate rights on the basis of race. An early sign of such emerging restrictions and one of the most important legal distinctions was the passing of laws denying free blacks the right to keep arms. "In 1640, the first recorded restrictive legislation passed concerning blacks in Virginia excluded them from owning a gun." Lee B. Kennett and James LaVerne Anderson, The Gun in America: The Origins of a National Dilemma 50 (1975).

> Virginia law set Negroes apart from all other groups ... by denying them the important right and obligation to bear arms. Few restraints could indicate more clearly the denial to Negroes of membership in the White community. This first foreshadowing of the slave codes came in 1640, at just the time when other indications first appeared that Negroes were subject to special treatment.

W. Jordan, White over Black: American Attitudes Toward the Negro, 1550-1812 78 (1968).

In the later part of the 17th Century fear of slave uprisings in the South accelerated the passage of laws dealing with firearms possession by blacks. In 1712, for instance, South Carolina passed "An act for the better ordering and governing of Negroes and Slaves" which included two articles particularly relating to firearms ownership and blacks. 7 Statutes at Large of South Carolina 353-54 (D.J. McCord ed. 1836-1873). Virginia passed a similar act entitled "An Act for Preventing Negroes Insurrections." 2 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619, 481 (W.W. Henning ed. 1823).

Thus, in many of the antebellum states, free and/or slave blacks were legally forbidden to possess arms. State legislation which prohibited the bearing of arms by blacks was held to be constitutional due to the lack of citizen status of the Afro-American slaves. State v. Newsom, 27 N.C. 250 (1844). Cooper v. Mayor of Savannah, 4 Ga. 68, 72 (1848). Legislators simply ignored the fact that the U.S. Constitution and most state constitutions referred to the right to keep and bear arms as a right of the "people" rather than of the "citizen". Stephen Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason U. L. Rev. 1, 15 (1981).

Chief Justice Taney argued, in the infamous Dred Scott case, that the Constitution could not have intended that free blacks be citizens:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operations of the special laws and from the police regulations which they [the states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, ... [A]nd it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1856) (emphasis added). In a later part of the opinion, Justice Taney enumerated the constitutional protections afforded to citizens by the Bill of Rights:

> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

Id. at 450. Clearly, the Court viewed the right to keep and bear arms as one of the fundamental individual rights guaranteed to American citizens by the Bill of Rights; which, blacks, who according to the Court were not American citizens, could not enjoy.

B. Black Codes, Reconstruction and the Fourteenth Amendment: A Fundamental Individual Right to Keep And Bear Arms

After the Civil War, southern legislatures adopted comprehensive regulations, Black Codes, by which the new freedmen were denied many of the rights that white citizens enjoyed. These Black Codes often prohibited the purchase or possession of firearms by freedmen. The Special Report of the Anti-Slavery Conference of 1867 noted with particular emphasis that under these Black Codes blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." Reprinted in H. Hyman, The Radical Republicans and Reconstruction 219 (1967).

Mississippi's Black Code included the following provision:

> Be it enacted ... [t]hat no freedman, free negro or mulatto, not in the military ... and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, ... and all such arms or ammunition shall be forfeited to the informer ... .

1866 Miss. Laws ch. 23, §1, 165 (1865).

In response to these Black Codes and the South's deprivation of the civil rights of the freedmen, the U.S. Congress enacted a series of civil rights bills and the Fourteenth Amendment. The legislative histories of these acts and the Fourteenth Amendment are replete with denunciations of the disarmament of blacks and state the intent of the drafters to guarantee to the freedmen the individual right to keep and bear arms for personal self-defense. Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 256 (1983); Halbrook, supra, 4 Geo. Mason U. L. Rev. at 21-26. Akhil Reed Amar,

The Bill of Rights 264-266 (1998). The aforementioned intent was "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment." Amar, supra, The Bill of Rights 264. *See also*, Stephen P. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876 (1998).

One of these civil rights acts was the Freedman's Bureau Act, which required that "laws ... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens." 14 Stat 173, 176 (1866) (emphasis added).

In support of Senate Bill No. 9, which declared as void all laws in the former rebel states which recognized inequality of rights based on race, Senator Henry Wilson (R., Mass.) explained that: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them ... ." Cong. Globe, 39th Cong., 1st Sess. 40 (1865).

The framers of the Civil Rights Act of 1866 argued that the issue of the right to keep and bear arms by the newly freed slaves was of vital importance. Senator William Salisbury (D., Del.) stated that "[i]n most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power." Id. at 478. Representative Henry J. Raymond (R., N.Y.) explained that the rights of citizenship entitled the freedmen to all the rights of United States citizens: "He has a defined status: he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the Federal Courts ... ." Id. at 1266.

During the debate on the Fourteenth Amendment, Kansas Senator Samuel Pomeroy asked:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable--
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love. . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .

Cong. Globe, 39th Cong., 1st Sess 1182 (1866).

The legislators were specifically concerned with the violation in the South of the freedman's right to keep and bear arms.

> Senator Howard . . . explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government . . . .

Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1167 (1991) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.

Eric Foner, Reconstruction 258-59 (1988) (emphasis added).

Within three years of the adoption of the fourteenth amendment in 1868, Congress was considering legislation to suppress the Ku Klux Klan. In a report on violence in the South, Representative Benjamin F. Butler (R., Mass.) stated that the right to keep arms was absolutely necessary for protection. He noted instances of "armed confederates" terrorizing the negro, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms' which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (1871).

The anti-KKK bill was originally introduced to the House Judiciary Committee with the following provision:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

Cong. Globe, 42nd Cong., 1st Sess. 174 (1871) (emphasis added).

Representative Butler explained the purpose of this provision:

> Section 8 is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' ... . This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge ... ; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were there in jail in that county.

H.R. Rep. No. 37, 41st Cong., 3rd Sess. 78 (1871).

The drafters of the civil rights acts and of the Fourteenth Amendment specifically intended to protect the individual fundamental right of the freedmen to keep and bear arms. Amar, supra, 100 Yale L.J. 1131. Amar, supra, The Bill of Rights. Halbrook, supra, 4 Geo. Mason U. L. Rev. 1. Stephen P. Halbrook, Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions Of the Framers of the Fourteenth Amendment, 5 Seton Hall Const. L.J. 341-434 (1995).

> The [Reconstruction] Congressmen of this period were hardly interested in strengthening the state militias . . . or in reinforcing states' rights. The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.

David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. Rev. 1359, 1453-54 (1998). As noted constitutional scholar Akhil Reed Amar commented, the focus of the Second Amendment had changed:

> In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns. This idea, focusing on private violence and the lapses of local government rather than on the public violence orchestrated by central soldiers, is far closer to the unofficial motto of today's National Rifle Association, "When guns are outlawed, only outlaws will have guns."

Amar, supra, The Bill of Rights, at 266.

C. Post-Reconstruction

Even after the passage of the Civil Rights Act and the Fourteenth Amendment, southern states continued in their effort to disarm blacks. Some Southern states reacted to the federal acts by conceiving a means to the same end: banning a particular class of firearms, in this case cheap handguns, which were the only firearms the poverty-stricken freedmen could afford. William Tonso, Gun Control: White Man's Law, Reason, Dec. 1985, at 23.

In the very first legislative session after white supremacists regained control of the Tennessee legislature in 1870, that state set the earliest southern postwar pattern of legal restrictions by enacting a ban on the carrying, "publicly or

privately," of, among other things, the "belt or pocket pistol or revolver." Andrews v. State, 50 Tenn. (3 Heisk.) 165, 172 (1871) (citing "An Act to Preserve the Peace and Prevent Homicide"). In 1879, the General Assembly of Tennessee banned the sale of any pistols other than the expensive "army or navy" model revolvers. State v. Burgoyne, 75 Tenn. 173, 174 (1881) (citing "An Act to Prevent the Sale of Pistols"). Don B. Kates, Jr., *Toward A History of Handgun Prohibition in the United States* in Restricting Handguns: The Liberal Skeptics Speak Out 14 (D. Kates ed. 1979).

In 1881, Arkansas followed Tennessee's law by enacting a virtually identical "Saturday Night Special Law," which again was used to disarm blacks. Dabbs v. State, 39 Ark. 353 (1882). Instead of formal legislation, other deep South states simply continued, in violation of the Fourteenth Amendment, to enforce the pre-emancipation statutes prohibiting the possession of firearms by blacks. Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 14.

A different route was taken in Alabama, Texas, and Virginia: there, exorbitant business or transaction taxes were imposed in order to price handguns out of the reach of blacks. An article in Virginia's university law review called for registration and a "prohibitive" sales tax on handguns as a way of disarming blacks. Comment, Carrying Concealed Weapons, 15 Va. L. Reg. 391, 391-92 (1909).

In many jurisdictions systems were emplaced where retailers would report to local authorities whenever blacks purchased firearms or ammunition. The sheriff would then arrest the purchaser and confiscate the firearm. Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 14. Mississippi legislated this system by enacting the first registration law for retailers in 1906, requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available to authorities for inspection. Id.

D. United States v. Cruikshank

Federal prosecutors, invoking the new civil rights laws, brought cases against KKK members and others who had violated the civil rights of freedmen. Many of these prosecutions involved charges that the defendants violated the Second Amendment rights of freedmen by confiscating the freedmen's firearms. *See* Kermit L. Hall, Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872, 33 Emory L.J. 921 (1984). One of these cases, arising out of the disarmament and murder of armed blacks in the Colfax courthouse (also known as the "Colfax Massacre"), and a subsequent federal prosecution of Klansmen for violation of the freedman's civil rights under the Enforcement Acts, went to the Supreme Court. *See* 16 Stat. 140 § 6 (1870); *see also* 18 U.S.C. §§ 241-242 (1994). United States v. Cruikshank, 92 U.S. 542 (1875). The indictment in Cruikshank charged, inter alia, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the right of assembly and the right to keep and bear arms for lawful purposes.

Cruikshank upheld the Klan's repressive actions against blacks in the South by holding the Enforcement Acts unconstitutional. Cruikshank, 92 U.S. 542. The Court held that because the rights of the victimized freedmen, including the right to free speech and the right to keep and bear arms, existed independently of the Constitution, and the first and second amendments guaranteed only that such rights shall not be infringed by the federal government, the federal government had no power to punish a violation of such rights by private individuals or the states. The Fourteenth Amendment offered no relief, the Court held, because the case involved a private conspiracy and not state action; the aggrieved citizens could seek protection and redress only from the state government and not from the federal government. Id. at 553-54.

Cruikshank signaled the end of reconstruction and, with the Slaughterhouse Cases, that century's defeat of the Fourteenth Amendment's attempt to make the Bill of Rights effective against state government abuses. "Firearms in the Reconstruction South provided a means of political power for many. They were the symbols of the new freedom for blacks .... In the end, white southerners triumphed and the blacks were effectually disarmed." Kennett and Anderson, supra, at 155.

E. Gun Control in the Twentieth Century

At the end of the 19th century, Southern states began formalizing firearms restrictions in response to an increased concern about firearms ownership by certain whites, such as agrarian agitators and labor organizers. In 1893, Alabama, and in 1907, Texas, began imposing heavy business/transaction taxes on handgun sales in order to resurrect economic barriers to ownership. South Carolina, in 1902, banned all pistol sales except to sheriffs and their special deputies, which included company strongmen and the KKK. Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 14-15.

The Supreme Court of North Carolina, in striking down a local statute which prohibited the open carrying of firearms without a permit in Forsyth County, stated:

> To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of arms which the people are entitled to bear. This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations.

State v. Kerner, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921).

In the Northeast, the period from the 1870's to the mid-1930's was characterized by strong xenophobic reactions to Eastern and Southern European immigrants. Armed robbery in particular was associated with the racial stereotype in the public mind of the East and South European immigrant as lazy and inclined to violence and espousing anarchy. The fear and suspicion of these "undesirable" immigrants, together with a desire to disarm labor organizers, led to a concerted campaign by organizations such as the Immigration Restriction League and the American Protective Association, for the enactment of a flat ban on the ownership of firearms, or at least handguns, by aliens. Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 15-16.

In 1911, New York enacted the Sullivan law. N.Y. PENAL LAW § 1897 (Consol. 1909)(amended 1911). "Of proven success in dealing with political dissidents in Central European countries, this system made handgun ownership illegal for anyone without a police permit." Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 15. The New York City Police Department thereby acquired the official and wholly arbitrary authority to deny or permit the possession of handguns; which the department used in its effort to disarm the city's Italian population. The Sullivan law was designed to

> strike hardest at the foreign-born element .... As early as 1903 the authorities had begun to cancel pistol permits in the Italian sections of the city. This was followed by a state law of 1905 which made it illegal for aliens to possess firearms 'in any public place'. This provision was retained in the Sullivan law.

Kennett and Anderson, supra, at 177-78.

Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals or labor agitators. Kates, supra, *Toward A History of Handgun Prohibition in the United States*, at 18-19.

After World War I, a generation of young blacks, often led by veterans familiar with firearms and willing to fight for the equal treatment that they had received in other lands, began to assert their civil rights. In reaction, the Klan again became a major force in the South in the 1910's and 1920's. Often public authorities stood by while murders, beatings and lynchings were openly perpetrated upon helpless black citizens. And once again, gun control laws made sure that the victims of the Klan's violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the specially deputized Klansmen in the safety of their monopoly of arms. Id. at 19.

The resurgence of the Klan was not limited to the South, but was present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon. All of these states enacted either handgun permit laws or laws barring alien handgun possession between 1913 and 1934. The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreignborn; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities. Id. at 19-20.

II. CURRENT GUN CONTROL EFFORTS: A LEGACY OF RACISM

Behind current gun control efforts often lurks the remnant of an old prejudice, that the lower classes and minorities, especially blacks, are not to be trusted with firearms. Today the thought remains among gun control advocates: if you let the poor or blacks have guns, they will commit crimes with them. Even noted anti-gun activists have admitted this. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." Robert Sherrill, The Saturday Night Special 280 (1972). "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence - the reference is to 'nigger-town Saturday night." Barry Bruce-Briggs, The Great American Gun War, The Public Interest, Fall 1976 at 37.

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. In many jurisdictions which require a discretionary gun permit, licensing authorities have wide discretion in issuing a permit, and those jurisdictions unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals or groups may experience no difficulty in the granting of a permit. Hardy and Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions* in Restricting Handguns: the Liberal Skeptics Speak Out, supra, at 209-10; Tonso, supra, at 24. In St. Louis,

> permits are automatically denied ... to wives who don't have their husband's permission, homosexuals, and non-voters .... As one of my students recently learned, a personal 'interview' is now required for every St. Louis application. After many delays, he finally got to see the sheriff who looked at him only long enough to see that he wasn't black, yelled 'he's alright' to the permit secretary, and left.

Don B. Kates, Jr., On Reducing Violence or Liberty, 1976 Civ. Liberties Rev. 44, 56.

Permit systems which vest wide discretion in public or police officials have been used on numerous occasions to stymie civil rights efforts. *See*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148 (1969). New York's infamous Sullivan law, originally enacted to disarm Southern and Eastern European immigrants who were considered racially inferior and religiously and ideologically suspect, continues to be enforced in a racist and elitist fashion "as the police seldom grant hand gun permits to any but the wealthy or politically influential." Tonso, supra, at 24.

> New York City permits are issued only to the very wealthy, the politically powerful, and the socially elite. Permits are also issued to: private guard services employed by the very wealthy, the banks, and the great corporations; to ward heelers and political influence peddlers; ....

Kates, *Introduction*, in Restricting Handguns: the Liberal Skeptics Speak Out, supra, at 5.

A. By Prohibiting the Possession of Firearms, the State Discriminates Against Minority and Poor Citizens

The obvious effect of gun-prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families. That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.

African Americans, especially poor blacks, are disproportionately the victims of crime. The situation for households headed by black women is particularly difficult. In 1977, more than half of black families had a woman head of household. A 1983 report by the U.S. Department of Labor found that

> among families maintained by a woman, the poverty rate for blacks was 51%, compared with 24% for their white counterparts in 1977 ... . Families maintained by a woman with no husband present have compromised an increasing proportion of both black families and white families in poverty; however, families maintained by a woman have become an overwhelming majority only among poor black families .... About 60% of the 7.7 million blacks below the poverty line in 1977 were living in families maintained by a black woman.

U.S. Dept. of Labor, Time of Change: 1983 Handbook on Women Workers 118 Bull. 298 (1983).

The problems of these women are far more than merely economic. National figures indicate that a black female in the median female age range of 25-34, is about twice as likely to be robbed or raped as her white counterpart. She is also three times as likely to be the victim of an aggravated assault. Id. at 90. *See* United States Census Bureau, U.S. Statistical Abstract

(1983). A 1991 DOJ study concluded that "[b]lack women were significantly more likely to be raped than white women." Caroline Wolf Harlow, U.S. Dept. of Justice, Female Victims of Violent Crime 8 (1991). "Blacks are eight times more likely to be victims of homicide and two and one-half times more likely to be rape victims. For robbery, the black victimization rate is three times that for whites . . . ." Paula D. McClain, Firearms Ownership, Gun Control Attitudes, and Neighborhood Environments, 5 Law & Pol'y Q. 299, 301 (1983).

The need for the ability to defend oneself, family and property, is much more critical in the poor and minority neighborhoods ravaged by crime and without adequate police protection. Id.; Don B. Kates, Handgun Control: Prohibition Revisited, Inquiry, Dec. 1977, at 21. However, citizens have no right to demand or even expect police protection. Courts have consistently ruled "that there is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, courts have ruled that the police have no duty to protect the individual citizen. DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989); South v. Maryland, 59 U.S. 396 (1855).

The fundamental civil rights regarding the enjoyment of life, liberty and property, the right of self-defense and the right to keep and bear arms, are merely empty promises if a legislature is allowed to restrict the means by which one can protect oneself and one's family. This constitutional deprivation discriminates against the poor and minority citizen who is more exposed to the acts of criminal violence and who is less protected by the state.

Reducing gun ownership among law-abiding citizens may significantly reduce the proven deterrent effect of widespread civilian gun ownership on criminals, particularly in

regard to such crimes as residential burglaries and commercial robberies. Of course, this effect will be most widely felt among the poor and minority citizens who live in crime-ridden areas without adequate police protection.

B. The Enforcement of Gun Prohibitions Spur Increased Civil Liberties Violations, Especially in Regard to Blacks and Other Minorities.

Constitutional protections, other than those afforded by the right to keep and bear arms, have been and are threatened by the enforcement of restrictive firearms laws. The enforcement of present firearms controls account for a large number of citizen and police interactions, particularly in those jurisdictions in which the purchase or possession of certain firearms are prohibited. Between 1989 and 1998, arrests for weapons carrying and possession numbered between 136,049 and 224,395 annually. FBI Uniform Crime Reports, Crime in the United States Annual Reports(1989-1998) Table: Total Arrests, Distribution by Age.

The most common and, perhaps, the primary means of enforcing present firearms laws are illegal searches by the police. A former Ohio prosecutor has stated that in his opinion 50% to 75% of all weapon arrests resulted from questionable, if not clearly illegal, searches. Federal Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Judiciary Committee, 94th Cong. 1589 (1975). [hereinafter House Hearings]. A study of Detroit criminal cases found that 85% of concealed weapons carrying cases that were dismissed, were dismissed due to the illegality of the search. This number far exceeded even the 57% percent for narcotics dismissals, in which illegal searches are frequent. Note, Some Observations on the Disposition of CCW Cases in Detroit, 74 Mich. L. Rev. 614, 620-21 (1976). A study of Chicago criminal cases found that motions to suppress for illegal evidence were filed in 36%

of all weapons charges; 62% of such motions were granted by the court. Critique, On the Limitations of Empirical Evaluation of the Exclusionary Rule, 69 NW. U.L. Rev. 740, 750 (1974). A Chicago judge presiding over a court devoted solely to gun law violations has stated:

> The primary area of contest in most gun cases is in the area of search and seizure ... . Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America ... . More than half these contested cases begin with the motion to suppress ... these arguments dispose of more contested matters than any other.

House Hearings, supra, at 508 (testimony of Judge D. Shields).

These suppression hearing figures represent only a tiny fraction of the actual number of illegal searches that take place in the enforcement of current gun laws, as they do not include the statistics for illegal searches that do not produce a firearm or in which the citizen is not charged with an offense. The American Civil Liberties Union has noted that the St. Louis police department, in the mid-1970's, made more than 25,000 illegal searches "on the theory that any black, driving a late model car has an illegal gun." However, these searches produced only 117 firearms. Kates, Handgun Control: Prohibition Revisited, supra, at 23.

In light of these facts, many of the proponents of gun control have commented on the need to restrict other constitutionally guaranteed rights in order to enforce gun control or prohibition laws. Federal Appellate Judge Malcolm urged the abandonment of the exclusionary rule in order to better enforce gun control laws. Malcolm Richard Wilkey, Why Suppress Valid Evidence?, Wall Street J., Oct. 7, 1977, at 14. Police Inspector John Domm called for a "reinterpretation" of the Fourth Amendment to allow police to assault

strategically located streets, round up pedestrians en masse, and herd them through portable, airport-type gun detection machines. Detroit Free Press, Jan. 26, 1977, at 4. Prominent gun control advocates have flatly stated that "there can be no right to privacy in regard to armament." Norville Morris and Gordon Hawkins, The Honest Politician's Guide to Crime Control 69 (1970).

However, statistics and past history show that many millions of otherwise law-abiding Americans would not heed any gun ban. One should consider America's past experience with liquor prohibition. Furthermore, in many urban neighborhoods, especially those of poor blacks and other minorities, the possession of a firearm for self-defense is often viewed as a necessity in light of inadequate police protection.

Federal and state authorities in 1975 estimated that there were two million illegal handguns among the population of New York City. Selwyn Raab, 2 Million Illegal Pistols Believed Within the City, N.Y. Times, Mar. 2, 1975, at 1, (estimate by BATF); N.Y. Post, Oct. 7, 1975, at 5, col. 3 (estimate by Manhattan District Attorney). In a 1975 national poll, some 92% of the respondents estimated that 50% or more of handgun owners would defy a confiscation law. 121 Cong. Rec. S. 189, 1 (daily ed. Dec. 19, 1975).

Even registration laws as opposed to outright bans, measure a high percentage of non-compliance among the citizenry. In regard to Illinois' firearm owner registration law, Chicago Police estimated the rate of non-compliance at over two thirds, while statewide non-compliance was estimated at three fourths. In 1976, Cleveland city authorities estimated the rate of compliance with Cleveland's handgun registration law at less than 12%. Kates, supra, Handgun Control: Prohibition Revisited, at 20 n.1. In regard to citizens' compliance with Cleveland's "assault gun" ban, a Cleveland Police Lieutenant stated: "To the best of our knowledge, no assault weapon was

voluntarily turned over to the Cleveland Police Department ... considering the value that these weapons have, it certainly was doubtful individuals would willingly relinquish one." Associated Press, Cleveland Reports No Assault Guns Turned In, Gun Week, Aug. 10, 1990, at 2.

In response to New Jersey's "assault weapon" ban, as of the required registration date, only 88 of the 300,000 or more affected weapons in New Jersey had been registered, none had been surrendered to the police and only 7 had been rendered inoperable. Masters, Assault Gun Compliance Law, Asbury Park Press, Dec. 1, 1990, at 1. As of November 28, 1990, only 5,150 guns of the estimated 300,000 semiautomatic firearms banned by the May 1989 California "Assault Gun" law had been registered as required. Jill Walker, Few Californians Register Assault Guns, Washington Post, Nov. 29, 1990, at A27.

These results suggest that the majority of otherwise law abiding citizens will not obey a gun prohibition law; much less criminals, who will disregard such laws anyway. It is ludicrous to believe that those who will rob, rape and murder will turn in their firearms or any other weapons they may possess to the police or be deterred from possessing them or using them by the addition of yet another gun control law to the 20,000 plus that are already in effect in the United States. James D. Wright, Peter H. Rossi and Kathleen Daly, Under the Gun: Weapons, Crime and Violence in America 244 (1983).

A serious attempt to enforce a gun prohibition would require an immense number of searches of residential premises. Furthermore, the bulk of these intrusions will, no doubt, be directed against racial minorities, whose possession of arms the enforcing authorities may view as far more dangerous than illegal arms possession by other groups.

> As civil liberties attorney Kates has observed, when laws are difficult to enforce, "enforcement becomes progressively haphazard until the last of the laws are used only against those who are unpopular with the police." Of course minorities, especially minorities who don't 'know their place', aren't likely to be popular with the police, and those very minorities, in the face of police indifference or perhaps even antagonism, may be the most inclined to look to guns for protection - guns that they can't acquire legally and that place them in jeopardy if possessed illegally. While the intent of such laws may not be racist, their effect most certainly is.

Tonso, supra, at 25.

Civil rights standards are already bearing the repercussions of the actions of overzealous gun prohibitionists. Take for instance the development of a new and lesser standard of constitutional protection in regard to tenants in public housing facilities.

The Richmond Housing Authority has banned the possession of all firearms, whether operable or not, by tenants in public housing projects. Richmond Tenants Org. v. Richmond Dev. & Hous. Auth., No. C.A. 3:90CV00576 (E.D. Va. Dec. 3, 1990). In 1988, the Chicago Housing Authority (CHA) and the Chicago Police Department (CPD) enacted and enforced an official policy, Operation Clean Sweep, which applied to all housing units owned and operated by the CHA, the purpose of which was the confiscation of firearms and illegal narcotics. Complaint, Rose Summeries, et al. v. Chicago Housing Authority, et al., Case No. 88C10566 (N.D. Ill. Nov. 30, 1988). The warrantless search policy consisted of indiscriminate random sweep searches, using metal detectors, of the CHA tenants' residences and personal effects found therein, and the detention and search of residents and guests, all without warning and without probable cause or reasonable

articulate suspicion. CHA tenants who objected or attempted to interfere with these warrantless searches were arrested. Id. at 78.

Of course, all of the CHA tenants were poor, and the vast majority of them were hispanic or black. Once again, oppressive firearms laws were used to facilitate the deprivation of the constitutional rights of those minorities.

CONCLUSION

The aforementioned violations of minorities' and poor peoples' civil rights by the overzealous enforcement of firearms prohibitions occurs already in the absence of a "firearms exception" to the Fourth Amendment. The creation of such a "firearms exception" to the Fourth Amendment would not only be unconstitutional (as neither the Fourth Amendment nor the parallel provision of the Florida Constitution provides for such a "firearm exception" to their commands) but would also be an invitation to unjustifiably seize and frisk any citizen if an anonymous source uses the magic word "gun" or "firearm." If the past and present are any indication, then it will be minorities (say for instance, three black males at a bus stop) who will be the primary victims of such unwarranted searches and seizures.

The judgment below should be affirmed.

Respectfully Submitted,

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